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ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1989



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1989] OLRB REP. JANUARY

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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Bargaining Unit - Certification - Employer having main operation in Kingston - Two service mechanics working out of Belleville - Whether sufficient community of interest to include mechanics in bargaining unit - Board considering *Usarco* factors and its policy of certifying on a municipal-wide basis - Board finding that sufficient overlap of work and integration of functions to consider this a case where the policy against cross-municipality bargaining units is not applicable - Appropriate unit including both groups of employees

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *D. G. Wozniak* and *H. Peacock*.

APPEARANCES: *E. Posen* for the applicant; *M. Farson* for the respondent; *D. Davidson* and *J. Hogan* for the objectors.

DECISION OF THE BOARD; January 5, 1989

1. This is the continuation of an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The decision below deals with the issue of the appropriate bargaining unit. The issue in dispute concerns the community of interest of two persons employed as service mechanics in the Belleville area. The applicant takes the position that because of the geographical separation of these employees from the respondent's main operation in Kingston, there is not sufficient community of interest between these employees and the employees in Kingston to include them in the bargaining unit. The respondent takes the position that its operation is an integrated one including Kingston and Belleville and therefore that the two employees should be included in the bargaining unit. An examination was conducted by a Labour Relations Officer and a hearing was held to hear the submissions of the parties on the transcript of that examination.
4. The respondent is in the business of selling soft drinks and related products to individuals and businesses in part of Eastern Ontario. It does so out of a plant in Kingston where over thirty employees report to work, and an office with a warehouse attached in Belleville, where two service mechanics and a sales supervisor report to work. About nine years ago, the company closed its Belleville plant, at which the two Belleville servicemen, Lloyd Weagent and Scott Bain, formerly worked, as a serviceman and shipper, respectively. The geographic territory served by the respondent includes the area from Brighton to the west, east to the International Bridge, north to Denbigh, the southern boundary being Lake Ontario. There are four service mechanics, two operating out of Belleville, and two operating out of Kingston, reporting to a common supervisor in Kingston. The area serviced by these servicemen is the same general area covered by sales representatives and delivery employees who report to work in Kingston.
5. We were referred to the *Usarco* case, [1967] OLRB Rep. Sept. 526 at paragraph 13 for criteria which were agreed by both parties to be relevant to our determination of the appropriate bargaining unit. We will initially look at the facts of this case in light of those criteria. First of these is community of interest, including nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances, functional coherence and interdependence. The three others are centralization of managerial authority, the economic factor and source of work.

(a) Community of Interest

(i) The nature of the work performed

Both parties agree that there is virtually no distinction between the work performed by the service mechanics out of Belleville or Kingston. The function of the service people is to repair and maintain soft drink coolers and fountain equipment, and to sell equipment if the opportunity arises. They each drive a separate vehicle to get to the customer locations to do this work. The person on stand-by, who carries the pager, one in each of Kingston and Belleville, takes a van home at night.

(ii) Conditions of employment

Aside from the fact that the Kingston employees punch a time clock and the Belleville employees record their hours by phone to the Kingston office, the conditions of employment are agreed to be virtually identical. Pay categories, benefits, hours of work, and vacation policy according to seniority are all the same. The only real distinction concerning conditions of employment concerns where they work. The two employees who work out of the Belleville service depot report to work in Belleville each morning and speak to Kingston by phone to receive work assignments. The service mechanics who work out of the Kingston plant report to the Kingston plant and are supervised directly by Jim Anderson, the same person to whom the Belleville people report by phone. Generally, the servicemen working out of Belleville take Belleville area calls, and those out of Kingston take those from the Kingston area and east.

(iii) Skills of employees

There is no distinction between the skills and ability of the employees in Kingston and those in Belleville. They are all long service people who know and understand their work and are agreed to need little supervision on a day to day basis.

(iv) Administration

The administration which applies to both the service mechanics in Kingston and those in Belleville is in Kingston. The whole operation is administered from Kingston as indicated by the company's organizational chart. The Belleville service mechanics' work is assigned from Kingston with the exception of an occasional request for a special event from the Belleville sales supervisor. Pay cheques are issued at the Kingston plant and are usually brought by a sales representative from Kingston to Belleville. An incentive system is administered on a departmental basis from Kingston. The Belleville and Kingston servicemen together form one department for this purpose, although separate records are kept of calls from Kingston and Belleville. The total number of calls designated to each area is split evenly. Quality assurance, being cleaning of the equipment at particular times of the year is also directed out of the Kingston plant.

(v) The geographic circumstances

This is the real point of division between the parties. Belleville is some 50 kilometres from Kingston. The two service mechanics are the only non-managerial personnel who report to work in Belleville. The sales people who cover the Belleville area, although one of them is said to live in Belleville, report to Kingston each morning and travel to the Belleville area to perform their duties, as do delivery employees. A Belleville customer calls a Belleville phone number, which rings in Kingston. The work is dispatched from there to a pager carried by one of the Belleville service mechanics. They decide between themselves which of them will do the work. There is some overlap in the geographic area covered by the service mechanics who work out of Kingston and Belleville in the northern part of the territory, called the "grey area" by the service supervisor, Jim Anderson. Overlap also occurs when business is heavy, on an "as needed" basis. Mr. Anderson said it was hard to be precise about how often this interchange of employees would happen. The serviceman who was examined, Scott Bain, said he would do service work in the Kingston area two to five times a month although he is not familiar with the Kingston city installations. His calling card gives the employer's Kingston address. Servicemen from Kingston work in the Belleville area as replacements for vacation, holidays, illness or if extra help is needed, and vice versa. An individual who does work in the service department as summer and vacation replacement, as required in Belleville, normally works as a driver out of Kingston. He also occasionally does service work out of the Kingston office as a vacation replacement. There is always a mechanic on stand-by in each location. Parts and equipment are to a certain extent separately maintained in Belleville, but most parts are requested on a day-to-day basis from Kingston and are taken by sales representatives to Belleville. Sometimes the Belleville servicemen need to go to Kingston to work on certain equipment or pick up equipment too large for the sales representatives' cars. There are occasional informal meetings of all service people in the service department and their supervisor in Kingston. The service supervisor goes to Belleville approximately once a month to deal with Belleville service matters or the installation of new equipment, when costs have to be assessed, and discusses matters with the Belleville servicemen when they come to Kingston for equipment.

(vi) Functional coherence and interdependence

The applicant maintains that although there is some transfer of work back and forth between Kingston and Belleville it is not enough to create an integrated operation. It maintains that the need to go to Kingston from time to time to work there or do a service call in Kingston only arises in unusual circumstances where people are absent or there is a problem with coverage. The applicant acknowledges that there is interdependence on the question of parts which all come from the Kingston office. The service supervisor indicated he would not want two servicemen off on vacation at any one time, regardless of whether they worked in Belleville or Kingston. However, he does not consider the service department a pool composed of Belleville and Kingston service employees, in that he would never allow the two people in either Kingston or Belleville to be off at the same time.

(b) Centralization of managerial authority

Managerial authority for all four servicemen is exercised entirely from Kingston.

(c) The economic factor

The company's reason for having two individuals servicing the Belleville area was described as "strictly economic" by the service supervisor, as it is "more advantageous for them to be up there working 8 hours a day than to commute back to Kingston, and back to Belleville again". However, the Belleville operation is not monitored separately from a production point of view.

(d) Source of work

Work comes to the Belleville servicemen from calls originating in Belleville and routed through Kingston. When there is a special event in the Belleville area, the sales supervisor in Belleville may also request they do some work but if it conflicts with their regular work, Mr. Anderson in Kingston has to authorize it.

6. Union counsel argued that all of the factors in the *Usarco* case are not of equal importance and that the geographic factor is very important. We were urged to presume that the application was made just for the Belleville employees and to conclude that the Board would not find it appropriate to fashion a bargaining unit other than all employees who work out of Belleville. The applicant underlines the geographic factor as that factor which tips the scales and favours the exclusion of the Belleville employees from the bargaining unit, as they work in an isolated fashion in Belleville.

7. The respondent argues that the operation is a unitary one; the servicemen are not creatures apart, having no greater link to the Kingston plant than the sales representatives and drivers who report for work in Kingston. It maintains that the kind of distinction between Kingston and Belleville that the applicant is trying to draw applies to the sales and delivery people as well. The sales people who report to the Belleville sales supervisor have not been challenged by the union. Counsel maintains that if the union makes no objection to the sales people and delivery drivers being in the bargaining unit when they service the Belleville area, that it makes no sense to object to the inclusion of the service mechanics who work out of the Belleville location.

8. Counsel describes this situation as one plant which services a large area, arguing that the evidence does not disclose any distinct organization in Belleville, nor does the Board's jurisprudence suggest that it should be construed that way. She argues that nothing turns on the difference in manner of reporting between the two pairs of servicemen and the delivery and sales people. It is simply that the delivery people need to pick up the product in Kingston, the sales people have regular sales meetings in Kingston and the service people need to be close to customer locations. Counsel for the respondent argues that none of the facts create a different labour relations environment or community of interest. We are urged to look at the whole operation rather than just four servicemen.

9. The respondent asserts that granting the applicant's request would fragment the bargaining unit, increasing the likelihood of strikes and jurisdictional disputes. Counsel stresses that broader based units enhance various aspects of collective bargaining as set out in the *Harlequin* case [1987] OLRB Rep. Feb. 226, in which the Board favoured a broader grouping and suggested

that the most comprehensive unit which was viable for collective bargaining should be the appropriate bargaining unit. Counsel for the respondent asserts that there is no merit to a separate unit for Belleville. She queried whether or not when the senior people retire the union was not going to want the mobility for their members - should not their members be able to compete for the vacancies in Belleville as well as those in Kingston? She asked if there was any reason for not affording the protections of the collective agreement to these two very senior employees. She asserts that nothing in the facts suggests that the larger unit in this case significantly impedes access to collective bargaining. In addressing the view expressed in some of the Board's jurisprudence that if the applicant unit is *an* appropriate unit it should be accepted, counsel indicated that the negative result of this would be that undue weight would be given to the politics of the positions taken by the parties on community of interest. Counsel maintains that the union has no legitimate motive in trying to exclude the Belleville employees and asserts that that was merely "an exercise in numbers". She suggested that the implication would be that whenever the employer hired people outside of Kingston and made phone arrangements with them to call in they would be excluded from the bargaining unit.

10. The question of the appropriateness of a particular bargaining unit cannot be determined by any precise formula, there being none provided in the Act. Each case turns on its peculiar facts, which may or may not have a close analogue in previous Board cases. We were referred to no case with a fact situation particularly close to the one at hand.

11. The determination of the appropriateness of the bargaining unit is part of the process of carrying out the objectives of the *Labour Relations Act*. As the Board said in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250:

The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case.

12. The question to be answered has been set out as follows in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, where it was described as "a relatively simply question":

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

This followed a discussion by the Board of the wide variety of collective bargaining structures that may be appropriate, even if unconventional, and the complicating influence of parties' tactical choices concerning preferred bargaining units.

13. As the Board said in *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. June 340, at paragraph 22:

The Board is not concerned with whether a bargaining unit is more appropriate or most appropriate but whether the bargaining unit applied for is appropriate. However, the efficacy of collective bargaining and the concept of larger bargaining units becomes a more significant factor where the Board is required to exercise its discretion and choose between appropriate bargaining units.

14. The *Usarco* case, *supra*, referred to by both counsel, focused on the unit applied for and deals with the factor of geographic separation within a single municipality, but stated, at paragraph

13, page 529, that when all the listed factors had been taken into account “the Board is able to determine whether or not there is an integrated operation which indicates the appropriateness of one inclusive bargaining unit.” If this test also applies across municipalities, the Board, on the evidence before us, has no difficulty concluding that the operation is an integrated one, and that the inclusive bargaining unit preferred by the respondent is *an* appropriate bargaining unit. The principal objection to this unit raised by the applicant is the large distance between the two locations, “the geographic factor”. A similar objection was raised by the respondent in *The Board of Health of the York - Oshawa District Health Unit*, *supra*, and was answered by the Board at paragraph 16, page 343, as follows:

One of the objections to establishing the comprehensive bargaining unit is that there is a geographic separation between the two units. There is no doubt that geography or physical location of the employer's operations is a factor to be considered in determining bargaining units. Contemporary means of communication, methods of travel, and access between separate parts of an employer's operations should be considered when geography becomes a factor. In this case geography poses no problem because of the availability of modern highways between the centres, the ready communication and the fact that the nature of the operation is to service a large geographic area. This is corroborated by the evidence and representations which indicate that geography is not of particular concern to the respondent in the administration of the health unit.

Those remarks are equally applicable here, especially given the structure of the sales and delivery aspects of the operation.

15. *Mobil Chemical Canada, Ltd.*, [1987] OLRB Rep. April 559, referred to by respondent's counsel, involved a request by the applicant for a single-plant unit, where the employer operated two plants in the same municipality. The Board departed from its general practice of granting separate bargaining units at each plant where an employer carries on business at more than one plant within a municipality, because it concluded that there was a substantial community of interest among the employees at the two plants. It emphasised the Board's long-standing aversion to fragmentation of bargaining units which reinforced the appropriateness of the broader based unit. Having considered the effect of the broader based unit on employees' access to collective bargaining, the Board had regard to the extent to which the chemical industry is organized and did not rely on the applicant's organization of only one plant. In the case before us we had neither evidence nor submissions suggesting that the larger unit would impede access to collective bargaining, or frustrate the applicant's organizing pattern. It is therefore unnecessary to consider this aspect as a factor influencing the appropriateness of the larger bargaining unit in this case.

16. Given that there may be more than one appropriate bargaining unit, if the applicant's proposed unit is also appropriate, the preference of the applicant would have increased weight. The applicant's proposed unit appears consistent with the Board's reluctance to certify one unit across different municipalities. The Board's general practice has not been to include employees in widely separated municipalities unless there are compelling reasons to do so, such as regular interchange of employees, or a single employee at a second location. See *Brantox Holdings Limited*, [1969] OLRB Rep. August 609 and *Wittich's Bread Limited*, [1969] OLRB Rep. January 1019. In the latter, the employer operated a business of manufacturing and wholesaling bakery goods. The applicant sought a unit of the 14 driver-salesmen at one location. The respondent sought to include as well its other 5 driver-salesmen at a distance 50 miles away, who received all their product and were supervised from the first location. Holiday relief occurring approximately every four months was found to amount to isolated interchange, insufficient to warrant their inclusion in one bargaining unit. The impracticality of assigning employees from one location to routes out of the other on a regular basis was found to militate against a finding of sufficient community of interest. The Board said, at paragraph 5:

Where it is not practical, from the employer's or the employee's point of view, to interchange two groups of employees on a day to day basis, there must be other compelling reasons to cause the Board to find that the two groups constitute a single bargaining unit.

17. In *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656, the Board articulated the reasons for the Board's one municipality practice at paragraph 6, as follows:

As the parties are aware, the Board's normal practice is to look at an appropriate unit in terms of the municipal boundaries within which a facility is located.... This fairly rigid policy of the Board meets two concerns of the labour relations community: it provides an element of balance between the viability or rationality of bargaining units and the right to self-organize, and it provides a measure of predictability, along the lines of which parties can conduct themselves at the organizational stages of a certification campaign. Like every policy of the Board, of course, it is not without its exceptions. In *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491, for example, the Board noted its concern over the fact that the bargaining unit sought by the applicant transcended a number of municipal boundaries, and adverted to its normal policy in that regard. The Board then went on to state at page 492:

"This does not mean, however, that a regional bargaining unit will never be appropriate. Rather, it simply means that such a unit must be consistent with two basic considerations - 1) the right of self-organization; 2) the requirement that collective bargaining relationships be viable."

and then noted at page 493:

"In this case, the applicant has organized all but one of the stores falling within its proposed bargaining unit description, virtually eliminating any interference with the right of self-organization. This means that in this case considerations of viability assume greater importance."

On the question of self-organization and access to collective bargaining, the Board said in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250:

Where it is raised as an issue, the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration required the Board to take into account the pattern of organization in the case before it and to balance the pattern of organization against disruptive effects of excessive fragmentation.

In the facts before us, as noted above, the issue of employee access to collective bargaining was not raised before us, and therefore does not need to be determined. However, we would note that the case law makes a distinction between access to collective bargaining and failure to obtain employee support, the latter not being a factor which forms part of the Board's determination of the appropriateness of the bargaining unit. As stated in *Imperial Clevite Canada Inc.*, [1983] OLRB Rep. Oct. 1670,:

The Board does not exclude from bargaining units those groups of employees whose support for the union is low. Equally, the Board will not permit a union to apply to be certified for only one group of employees within an appropriate unit because that is the only group that happens to support the union....

18. The focus of inquiry was widened from the municipality to the "general geographic area" in *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, a case which involved a geographic separation of eighteen miles, but the one municipality practice was applied nonetheless. In the absence of a capacity for regular interchange of employees and the dissimilar nature of the operations at the two facilities, the Board was not satisfied there was sufficient community of interest of employees at the two locations.

19. The Board has certified bargaining units that cover a significant geographic area particularly when the organizations consist of several locations at some distance from one another. For instance, in the *Brock Milk* case [1984] OLRB Rep. May 683, the Board found that the most reasonable approach where the employer was carrying on a single operation which covered a number of municipalities was to certify a single unit covering all the municipalities, granting the applicant's request over the respondent's objection.

20. The principal objection to the appropriateness of the applicant's proposed unit is the fragmentation of the bargaining unit and the consequent labour relations problems for the employer listed by the respondent's counsel. At the present time, there being only two employees in question, who are not sought to be organized separately, the problems do not appear grave. However, the bargaining unit is a framework which must be sound and viable for future collective bargaining as well as the present. The structure may influence how work is organized in the future, for instance. Besides the problems listed by employer counsel, there is the danger of the frustration or weakening of collective bargaining if growth or transfer of work were to occur in the Belleville area. We do not find it sound to hive off a portion of the single operation.

21. In any event, there is sufficient overlap of work and integration of function, between the Kingston and Belleville locations to consider this a case where the policy against cross-municipality bargaining units is not applicable. We do not find that the Belleville servicemen work in an isolated fashion in Belleville. The need for the Belleville servicemen to go to or work out of Kingston happens two to five times a month, an average of close to once a week. The facts of this case, in terms both of the extent of employee interchange and general integration of the operation, are distinguishable from the cases cited above which reinforced the single municipality bargaining unit policy. We are of the view that a unit excluding the two Belleville servicemen would not be appropriate in all the circumstances of this operation, which we find to be an integrated one.

22. For the foregoing reasons, the Board in the exercise of its discretion under section 6(1) of the Act finds that all employees of the respondent in Kingston and Belleville, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. The respondent has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list, in accordance with the *Labour Relations Act* and the Rules of Procedure under the Act. Having regard to the list of employees and the Board's finding with respect to the appropriate bargaining unit, the Board is satisfied that there were 37 employees in the unit at the time the application was made. Included in this number are Messrs. Ewart and Anghelescu, reinstated by the Board's decision of July 7, 1988 in File Nos. 2435-87-U, 2787-87-U, 2788-87-U and 2789-87-U.

24. The applicant has filed documentary evidence of membership consisting of combination applications for membership and receipts. It filed 23 such documents, 20 of which coincide with the names of employees in the bargaining unit. The membership evidence is supported by a duly completed Form 9 - Declaration Concerning Membership Documents.

25. The Board is satisfied, on the basis of all the evidence before it, that not less than forty-five percent and not more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 1, 1987, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

26. A representation vote will be held among the employees in the bargaining unit set out above. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

27. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with Coca-Cola Ltd.

CONCURRING OPINION OF BOARD MEMBER HUGH PEACOCK; January 5, 1989

1. I agree with the findings and decision of the Board and wish to add these comments.

2. This decision is at variance with what is often referred to as the Board's general policy of describing the geographic scope of a bargaining unit by reference to the municipality within which the employer is located or based. Uniquely, the bargaining unit described in this decision encompasses two separate and distinct municipalities, Kingston and Belleville, 50 kilometers apart but situated within a much larger trading area served by the employer. The appropriateness of a bargaining unit covering Belleville where only 2 of the 37 employees of Coca-Cola Ltd., Kingston are employed is, at first glance, questionable.

3. Many certification decisions use such phrases as "the general practice of the Board, "the Board's consistent practice", "a fairly rigid policy", "the Board's usual practice" in confirming the appropriateness of the municipal-wide scope of an all-employee unit in the non-construction sectors. Given a degree of reliance by trade unions and employers on this long-standing and prevailing approach to the formation of bargaining structures, the Board must be cautious in assessing the factors that would lead to a departure from the "standard". There are, however, a large number of decisions recording exceptions to the norm (none on the particular point of this case) which judge appropriateness in terms other than just the geography of the municipal boundary.

4. There is no question of the adequacy of the community of interest in the unit applied for by the trade union. In *Harlequin Enterprises*, however, (referred to above), the Board has clearly linked the community of interest factors that form the labour relations bond between employees to the test of viability to carry on collective bargaining successfully:

The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but, rather, goes to the issue of viability: *Niagara Regional Health Unit*, [1975] OLRB Rep. Apr. 376; *Bestview Holdings*, [1983] OLRB Rep. Aug. 1250; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7. It is the question of *viability* which is paramount and that may require bargaining units defined in terms of community of interest or some broader reference where sound labour relations policy reasons so require: *The Children's Aid Society* case, [1976] OLRB Rep. Dec. 861.

[Emphasis in the original]

5. To my mind, therefore, viability is not to be determined by reference to community of interest factors solely within a proposed municipal-wide unit. The effect of a Kingston-based unit is to exclude the two Belleville employees from collective bargaining and to allow the employer to continue to deal with them more or less as the employer decides, though they are doing essentially the same work within the market area. This must subtract from the viability of a Kingston-based unit to carry on collective bargaining successfully.

6. Given the fragmentation that would result, I cannot agree that the geographic factor of

separation should override all the other factors of inter-relationship, combined as they are by the employer's administrative and economic arrangements. The bargaining unit described in paragraph 22 is the appropriate grouping of employees to be represented by the trade union.

0520-88-OH Mark Doucette, Complainant v. Continuous Colour Coat Ltd., Respondent

Health and Safety - Complaint that worker suspended for exercising his right to refuse unsafe work - Alleged that suspension followed a previous complaint under OHSA and was done in a manner which denied him the right to a Safety Committee member - Employer maintaining that no complaint of unsafe work was made before the complainant was suspended for refusal to follow a legal order to clean a paint roller at a time when the paint line was stopped - Board finding that work refusal not motivated by health and safety concerns - Board not treating failure of the employer to investigate under the Act as a reason to find that the employer has not discharged its onus of proof - Complaint dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Keith Oleksiuk*, *Mark Doucette* and *Gord Falconer* for the complainant; *Cheryl J. Elliott* and *Rich Watterson* for the respondent.

DECISION OF THE BOARD; January 25, 1989

1. This is a complaint under section 24 of the *Occupational Health & Safety Act* (O.H.S.A.) that Mark Doucette was suspended for exercising his right to refuse unsafe work. It is alleged that the suspension followed a previous complaint under the O.H.S.A. and was done in a manner which denied him the right to a Safety Committee member or steward on the occasion of both complaints.

2. The case is acknowledged by both sides to turn on credibility. The respondent maintains that no complaint of unsafe work was made before the complainant was suspended for refusal to follow a legal order to clean a paint roller at a time when the paint line was stopped. The complainant maintains he had refused an order to clean the bottom paint roller, while the line was running, for safety reasons, before he was suspended. It is common ground that cleaning the bottom paint roller or head while the line is running is unsafe. The danger in cleaning it when the line is running involves a 4 to 5 inch gap through which a strip of metal could fall and cut the employee's hands. The safety procedure manual makes it clear that the bottom head is not to be cleaned while the line is running. This was reaffirmed in the Minutes of a Joint Health and Safety Committee meeting dated August 21, 1986, as the result of a number of breaches of the safe procedure which were brought to the committee's attention by the complainant.

3. What follows is a summary of the findings of fact made by the Board after consideration of the evidence and submissions. Having weighed all the evidence, and assessed the demeanour of the witnesses we find that where there is conflict, we prefer the evidence of Karl Betz to that of Mark Doucette including the evidence on the crucial question of what work Doucette was ordered to do. Our recitation of the facts reflects that basic finding, our reasons for which are set out below.

4. The company's business involves painting coiled metal for uses such as refrigeration and swimming pool walls. The operation in dispute in this matter is known as prime coating. This refers to the application of a layer of prime paint onto metal by paint rollers that are part of the mechanized painting line. A customer order may require either the top or the bottom of the metal strip, or both, to be painted which will determine whether one or both of the rollers is engaged during any given operation.

5. The job of the prime coater operator includes responsibility to set up the paint (primer) to be applied to the metal strip - one or both sides, according to the order. The operator monitors the application to make sure that the rollers apply the right amount. After a series of coils have been painted, he cleans the rolls to get them ready for the next order if it calls for a different kind of paint. When the prime coaters are running he assists the finish coater operator at the next painting operation on the line in which the final paint coat is applied to the metal. The line may be moving when one is cleaning the top head but should be stopped when cleaning the bottom head. On average it takes 5 to 6 minutes to clean both rolls. Counsel agreed, for this case only, that cleaning and setting up the bottom and top heads was one of the bundle of duties of the prime coater operator, that workers received assistance from the senior operators when it was available, and that the appropriate time to do the work was when the line was not running.

6. Mark Doucette, the complainant in this matter, reports to Karl Betz, the afternoon paint line supervisor. His job is that of prime coater operator and has been for 2 years. The incident in question occurred on May 18, 1988. Enzo Carlini, the day paint line supervisor, was working the 8:00 a.m. to 4:00 p.m. shift, his regular shift. Doucette was working from 12:00 noon to midnight which involved four hours of overtime before his regular afternoon shift. Carlini does not generally supervise Doucette but did so for 4 hours that afternoon.

7. Doucette testified that he required assistance for cleaning all the time, and that when the rolls are changed he needs the help of a crane operator to remove them. He said that if the top and the bottom prime coater heads are both running, his primary function is to take care of the top head and he usually gets assistance from a senior operator who takes care of the bottom head, including cleaning it. Doucette maintains that there were conversations with Carlini and Steve Schtunyk, the senior foreman, prior to the incident in question, about who should do the bottom head. He maintains they came to the resolution that when the prime coater is running on the next job that the senior operator would assist in changing the rolls if necessary. Doucette does the changing alone when finish alone is going to run; he cleans up the bottom head and then goes and assists at the finish coater. When asked whose job it was to clean the bottom head, he said that he assumed the senior operators would do it because normally they do. He said he has never refused a direct order to change or clean heads on his own.

8. On May 18, 1988 Carlini received a phone call at about 3:50 p.m. from Doucette who wanted a senior operator to help him clean the bottom head. Doucette said he called asking for help cleaning the bottom roll *and* changing the rolls after he started cleaning the top roll. Carlini told him as soon as a senior operator was available he would send him down. The shift was to change at 4:00 p.m. which meant that some workers would be leaving and others would be coming on, leaving fewer people on the line at that moment in time. Within 5 or 6 minutes everyone would be back together again. Doucette says Carlini said there should be someone there so he continued cleaning the top roller. He finished cleaning the top and then wheeled the paint trays down to the man who cleans them. He then went and got a coffee since he had been working straight through for approximately 4 hours. Doucette returned to his station and called the crane driver who usually comes to help remove the top roll. He also called Carlini again, but did not get any assistance from him. The crane driver and he pulled out the roll. Since they were ready to run the finish on the

next coat and he had finished the top he turned the speed of the bottom head down so that it would not affect the other paint and turned the pump down so that it would not pump out, which is the proper procedure.

9. After the shift change, Carlini walked down the corridor about 4:15 and saw that Doucette was working at his own station and already had his top roll changed. The senior operators who had come on at 4:00 or 4:05 were at the finish coater station setting up the new paint. Carlini testified that at 4:25 Doucette went to Carlini's office and said, "Are you going to send a senior operator to clean the roll? You'd better send someone down because I am not cleaning it", and then stormed out of the office. Carlini did not say anything. Carlini says that Doucette was mad because he referred to the senior operators as lazy. Doucette does not recall going to Carlini's office or calling the senior operator's names on this occasion. Carlini's understanding about Doucette's complaint was that there was no senior operator helping him, that he wanted a senior operator to help him clean the bottom roll head.

10. Betz, the afternoon supervisor, came in at about 4:40 p.m. As usual, Carlini spoke to Betz about the upcoming jobs. He mentioned that the bottom side at the prime coater station was not yet clean. Betz testified that Carlini told him he had told Doucette to do it, but that it had not been done. Carlini testified that he did not order Doucette to clean the bottom roll because it did not need to be cleaned for the next order.

11. Doucette spoke to Betz when Betz came in. Doucette told Betz he had asked Carlini for a senior operator to come down and clean the head - that the senior operators had been at the finish coater and nobody had come to give him a hand. Betz described Doucette as "a little upset". Doucette angrily called the senior operators lazy, sons of bitches, "F'ing assholes" and said that all they do is help their own kind, which Betz understood as a reference to the skin colour of the senior operators. Doucette also said it was a senior operator's job to clean up and set up the bottom head and that the problem was they were lazy. Betz tried to tell him it was his job to clean up and set up the bottom prime and that he was responsible for the whole area; if assistance was available he would receive it which he normally does. Doucette said nothing about safety until after he was suspended. Betz told him he would have enough time to clean up and set up the bottom head and someone would probably help, but Doucette said no, "It's the senior operator's job." Betz repeated that it was not the senior operator's job, that it was part of Doucette's duties. Doucette disagreed again and therefore Betz "came out and asked Doucette" by saying, "I'm trying to make it perfectly clear it's your job." Doucette interrupted. Betz repeated that it was part of his job. Doucette replied, "No I'm not, it's the senior's job." Betz said, "Are you refusing to clean up and set up the bottom prime?" Doucette said, "Yes, the senior operator can do it." Again Betz said, "Are you refusing?" Doucette said, "Yes, the seniors can do it." Betz said, "You are suspended for failure to follow a supervisor's instructions", and told him that management would advise when he was to return. Betz testified that he expected Doucette to do the cleaning and set-up during the next set-up, not right at that moment when the machine was running. Betz said that he then told Doucette, "Come on with me and we'll see Fitz Williams." Fitz Williams is both the union steward and union safety committee representative. In his memo from shortly after the incident, Betz refers to him as the union steward; in evidence he referred to him as a health & safety representative. Doucette maintains that he and Betz walked to the finish station where Carlini was and he said to Carlini, "I refused - it's unsafe to clean it at this time. If you knew what was going on ...", and that Carlini said, "Keep me out of it - it's between you and your foreman." This was not put to Carlini in cross-examination, and was therefore neither confirmed or denied by him.

12. When union counsel asked Betz about the fact that Doucette had originally asked for help which indicated that he would have been willing to do the work, Betz agreed, but said that

later on he said he would not do it at all, not just that he would not do it without help. Betz acknowledged that the work that he wanted Doucette to do could not have been done for another two and a half hours given the fact that another run had to be done first. He suspended Doucette for refusing to do it in advance. He was aware that Doucette had previously done this work by himself and he was not aware of previous refusals to work other than for health and safety matters. Betz said his understanding of why Mark wanted the senior operators' help was that Doucette was upset because he had seen senior operators on the other shift helping their buddies, that he wanted help and he had not gotten any.

13. Doucette maintains and Betz denies there was a reference to a prior discussion about tools in this conversation and that Betz said, "Mark, you're starting up - you want to start an argument about the tools; you are giving me a hard time." Doucette had a discussion with Betz about his tools, a day or two before the incident for which he was suspended. Doucette asked Betz if he could hand in his tools. He said that his locker had been broken into and his personal possessions taken, including his company jacket. When he complained he was issued a new lock. However, after that there was a drill mark on the lock as if someone had tried to drill into it. He then asked Betz if he could hand his tools in and get them back when he needed them as he could not afford to replace them if they were stolen. Betz said that if he handed them in, he was resigning. The incident ended as Betz walked away to find someone else in management to be with him when he explained to Mark that if he was going to give up his tools, he would be resigning. Doucette came running up behind him and apologized and said to forget about it, that he was sorry - that he had flown off the handle. Betz said, "Some supervisors don't have as much patience as I do." Doucette said, "Let's forget it," and Betz responded, "Okay".

14. Betz went to the finish area shortly after his initial conversation with Doucette and shouted, "I am sending Mark home because he is refusing to clean the bottom side for the next set up." Betz acknowledged that he raised his voice, and was upset by this point because suspension is usually a last resort. Doucette, who was behind Betz, said "No, you didn't." Betz said "Yes, that's exactly what I meant, you are suspended." Betz then said "Let's go talk to the union steward." The steward's job station was about 15 feet away, but he was not working that shift.

15. Betz and Carlini then walked up to the front of the plant. Doucette came up behind them and, according to Betz and Carlini, said to Betz, "I always did as you asked. I thought we were friends. Don't do this." Carlini testified that Doucette then said he was not cleaning the bottom while the line was running. Betz testified that Doucette then offered to do the cleaning at the next set-up. Betz said, "I made up my mind, you are suspended." Carlini said "Mark, you are suspended, please, leave the premises." Carlini testified that Betz suspended Doucette for the balance of the shift and two days.

16. Doucette asked Robert Leslie, the paint-line helper, to come into Betz' office with him as a witness. Betz came in a short time later. Doucette said to Betz, "I don't know what's wrong with you Betz, we had a good working relationship." Betz replied, "You refuse to do it." Doucette said, "Yes, I refuse to do it at this time because it's unsafe. I'll do it later". Betz replied, "That's not what we discussed", meaning they had discussed doing the work when the machine was down. Doucette maintains that when he was then told to leave, he asked for a safety representative and was not granted one.

17. Leslie did not hear the conversations between Carlini and Doucette on the line. What he recalls from the conversation in the office with Betz and Doucette is the following: "We went into the office Betz, Mark and myself. Doucette asked why he was being suspended. Betz said he was being suspended because he refused to do his work. Doucette said no, I am refusing because

it's unsafe. Betz said he refused to do it and suspended him." When Leslie went into the meeting he did not know what it was for, he just knew that Doucette had been suspended. He had not been told at that point that Doucette was refusing the work because it was unsafe, or the nature of the work. He said that Betz did not want to discuss it anymore. Doucette did not explain anything to him about why he refused and what was unsafe at the meeting, or afterwards. He could recall no discussion about doing the work later. Leslie did make notes but he gave them to the health and safety inspector the next day.

18. Betz had assigned one of the senior operators to the prime area before meeting with Doucette and Leslie in his office. Doucette says on his way out a short time later he saw the senior operator changing the rolls while the line was running which made him laugh and say it was crazy. In cross-examination he testified he said something to the senior operator as he left to the effect that he should not be there. He says he cannot remember word for word what he said but he made a point of telling the safety committee and others. Betz said that he did not find out that the senior operators had cleaned the bottom head while the line was running until the Ministry of Labour inspector came. He acknowledged on cross-examination that the inspector had said that there could be charges against the company and the individuals for this. It was after this that Betz gave out safety contacts which are not discipline but are advice to employees about proper safety procedures.

19. Betz left the office after the meeting with Doucette & Leslie, saw Carlini and asked him to write down what he remembered. Betz then went back to the foreman's office and started to write a memo to Bob Helm, the Production Manager. He later called Steve Shtunyk, senior foreman, at home so that he would know what had gone on. He told him he had suspended Doucette for failure to follow orders to clean up the bottom head. Shtunyk told him that he had done the right thing because Doucette had committed a serious infraction. He told Betz to leave a report for him and that he would discuss it in the morning with Rich Watterson from Human Resources and Bob Helm, the Production Manager. When Betz finished the memo he made copies and left one for Helm and one for Shtunyk.

20. Doucette acknowledged in evidence that he has done the cleaning of the bottom head "lots of times" and that he did not need the help of the senior operator because the finish coat alone was going to run on the next run. He denied that the conversation with Betz was because he wanted the help from a senior operator, although he acknowledged that he had asked for help from Carlini. He maintains it was because of the safety issue which he raised as soon as Betz told him to clean the head. He could not recall telling Betz that the senior operators were helping at the finish and that no one would come down. Nor could he recollect being upset and calling the senior operators names. However, he acknowledged saying similar things before. He first said he might have been upset at that point - that he could not recollect. Later he said he was not upset but was just doing his job.

21. Carlini made notes about the events of the 18th at about ten o'clock the following morning after Louis Tolentino, the safety coordinator, phoned asking if he had heard about the work refusal. Carlini responded that he did not know that there was one. Carlini wrote a second statement on May 24, 1988 when the Ministry of Labour inspector was at the plant. In both statements he indicates that Doucette wanted senior operators to clean the bottom heads because he thought it was their job. Both statements also indicate that when Betz spoke to Carlini immediately after suspending Doucette, he told Carlini that Doucette was refusing to clean up the bottom during the next set-up. When asked in direct examination what Mark said at that same point, at the finish coater station Carlini testified, "Mark said, I am not cleaning the bottom while the line is running."

Carlini has previously seen Doucette clean the bottom rolls since whether or not he has help from a senior operator depends on work priority.

22. Carlini said that Doucette had previously objected to cleaning rolls about a week before the May 18th incident, at a time when the line was not running. He had been requested to help the finish operator clean the bottom roll. On that occasion, Carlini saw that Doucette was not cleaning the bottom roll; he asked Doucette about it, who replied that it was the senior operator's job, that he (Doucette) was not supposed to clean the bottom roll. When Carlini said, "Pardon me?" Doucette said, "Okay, okay, don't push me, I'll clean it." Carlini understood the objection on this occasion to be to cleaning the bottom roll at all, not just doing it alone. Doucette could not recall this incident.

23. On the morning of May 19, Shtunyk met with Watterson from Human Resources and Helm, the production Manager to discuss the previous day's incident. They decided on two days' discipline because Bob Helm, who discussed the matter with Carlini before the meeting, considered it a serious infraction. They considered the nature of the misbehaviour, refusal to work, which was repeated several times to the foreman. They considered both the private and the public discussions along the line. They had travelled about 400 feet talking and passed other employees. Doucette had made it very clear that he was refusing. They therefore thought it warranted more than just a suspension for the balance of the shift. They considered that Mark had no justification and had plenty of time during the set-up to think about it. They thought he just did not want to do the cleaning as it is a very messy job. Furthermore, he was holding up the clean-up for the line helpers, who have to clean up all the equipment for each head after the rolls have been cleaned.

24. Helm said they do not impose such discipline often but do so for flagrant disregard of plant rules or misconduct. During the last 4 or 5 years there had been one-day suspensions for refusal to work by a crane operator and for an employee found sleeping. Helm said that Doucette's previous work refusals were no part of the decision. At the time he decided on the discipline, he had not spoken to Betz because he was on the opposite shift. He relied on Betz' memo and Carlini who had been there. He knew that the work did not need to be done for an hour or so after the suspension. Helm did not learn until later on May 19th when the inspector came in that Doucette was treating it as a health and safety matter. However, he said that he took into account whether it was a health and safety matter because of the comment on Betz' report, which was: "Bob: After Mark had realized what he had said he tried to make it vocally known that I had instructed him to do something that was unsafe." He determined there was no health and safety issue because there was no conversation between Betz and Doucette about health and safety. The only time it became an issue was after the discipline in the office. He had no conversation with Doucette or with anyone from the union to confirm that understanding.

25. Shtunyk went looking for Doucette around noon on May 19th, and found him with Norm Dixon, the Chairman of the Joint Health and Safety Committee, and Dean Strachan, the union president, walking towards the cafeteria. He told Doucette he wanted to see him in his office right away. Shtunyk testified that Doucette came into his office and he asked him if he refused Betz's order to clean the bottom head during the next set-up. Shtunyk says that Doucette did not give him a verbal answer that he just "nudged" his shoulders. When he asked him what that meant he repeated the gesture again. Shtunyk says that Doucette started talking about the senior operators and that he had asked for help and no one came to give him a hand. Shtunyk told Doucette that he was responsible for both heads, their cleaning and setting up, and that he would get assistance if it was available. Shtunyk says Doucette told him that he went back to Betz to tell him that he would clean the head but that Betz would not let him go back. Shtunyk's impression was that Doucette knew he had made a mistake and that he did not really want to admit he had refused to

clean the roll. Shtunyk signed the disciplinary notice and he handed it to Doucette during the interview.

26. Shtunyk said that Doucette's explanation was that the senior operator should have come to help right after the job which he had just finished, that it was the senior operators' job; one should clean the bottom prime and one the bottom finish all the time. Shtunyk testified that Doucette said nothing about health and safety at this meeting, and that he never asked for union representation. Shtunyk said he had not asked about health and safety himself because he did not think it was a health and safety problem. Carlini had told him there was no health and safety problem and he was more concerned with the incident of refusing to do the work. Shtunyk said it was his understanding that it was the worker's decision whether or not he wanted someone with him as a union representative. Shtunyk said that Doucette did not ask and that if he had asked he would have brought one in.

27. Doucette gives an entirely different account of the meeting with Shtunyk. He says the union officials had told him to "make sure he got counsel from a steward and if he couldn't to say as little as possible." Doucette says that he went into Shtunyk's office and asked for a steward. Shtunyk refused. Shtunyk asked him what had happened. Doucette said, "Betz must have told you." Shtunyk said, "They've suspended you for the remainder of the week." Doucette says that Shtunyk was joking around and chuckling which he considered insulting. Doucette says that the meeting, which only lasted a few minutes, ended by his asking to speak to a steward on the way out and Shtunyk said, "No". When Shtunyk's testimony that they had discussed the whole incident was put to him, Doucette said he might have asked him if he refused and he did not answer. He says he did not say the senior operator should have helped, that he said nothing and that he remembers what he said and that he does not recall the things happening as Shtunyk testified. When he left Shtunyk's office, Norm Dixon was nearby; Doucette told him that he could not talk to him, that he had to go home and that he would talk to him next week.

28. A meeting with the Ministry of Labour inspector, concerning Doucette's alleged work refusal, was held on May 24, 1988. Doucette and Betz each gave his version of the events. No orders were issued as a result of the inspector's visit. The inspector's report cited a lack of communication.

29. Betz had been involved with a refusal to work of Mark Doucette's twice before, once in April when the Ministry of Labour was called in. Doucette had arrived at midnight and noticed a haze at the prime coater area which he believed would endanger his health so Betz assigned him other work. Betz explained this to the safety representative at the time, and told a senior operator to go look at the job after informing him of Doucette's refusal to work. The senior operator was willing to work on the job but Betz told him that if it got worse or unsafe he should call him right away. Betz tried to make adjustments to the line to reduce the fumes. At 1:00 a.m. the safety representative came and asked Betz what he had done and he told him that he had been making adjustments. The safety representative said he wanted it fixed. When Betz said he could not fix it that night, he could only reduce the problem, Williams called the Ministry. The inspector called back but could see no reason to come in at 3:00 a.m. and decided to come in at 8:00 a.m. the next morning instead. Doucette eventually acknowledged on cross-examination that his allegation in the complaint that he had been denied a steward during the investigation of his previous complaint was incorrect - that in fact Betz had investigated and he had been allowed to talk to the safety representative and had been assigned to alternative work. He explained that he "must have gotten mixed up", but maintained he was quite clear about what happened in May.

Conclusions

30. Counsel for the union suggests that Betz should have adhered to the *Occupational Health and Safety Act* even at the point where he says that he was first aware of the health and safety complaint as it would have produced an immediate clarification of the problem. Even if this is so, it is not necessary to decide in this case in order to determine the question before us as to whether the employer has committed a reprisal against the complainant.

31. Union counsel submits that where the company asked no question of Doucette or any other person from the union about the health and safety aspect of the case, i.e., they refused to investigate the health and safety aspect of the case, it is impossible for them to meet the onus of proof that they have under section 24(5). Where the Board has found that the work refusal was not motivated by health and safety concerns, the Board has dismissed the complaint and has not treated failure of the employer to investigate under the Act as a reason to find that the employer has not discharged its onus of proof. See, for instance, *Boise Cascade*, [1983] OLRB Rep. Jan. 20 and *Inco Metals* [1982] OLRB Rep. Sept. 1315. We adopt that approach as well.

32. The union characterizes Doucette as a person with strong health and safety concerns, who has consistently stood up for his rights under the Act but has never refused a direct order except for health and safety reasons. Counsel underlined that it was Doucette who raised the issue of doing work while the line was running which resulted in its being clearly set out in the Health and Safety minutes. This argument cuts both ways. It is difficult to believe that a person who had successfully asserted his rights on more than one occasion in the past would have failed to acquire union representation or the active involvement of the safety committee representative at the time of either the suspension or the interview with Shtunyk if he had wished it.

33. Union counsel contrasts Betz' behaviour in speedily disciplining Doucette on the day in question with his behaviour during the tools incident when he went to get another supervisor before accepting the tools from Doucette which he considered to be a resignation. Counsel describes Betz' motivation as that he had now had two prior incidents where Doucette had pushed him on health and safety and once on the tools and that the report from Carlini that he had not cleaned the bottom head was the last straw. Counsel says that if we are examining the things that give rise to motive there are a lot of reasons for this supervisor to have an axe to grind. He suspended someone for something that could not take place for two and half hours and made the decision without seeking another supervisor and then made a beeline for someone he described in evidence as a safety representative. Only later did he back off and say that he meant steward. Indeed, Betz did act hastily on the day in question and could have handled the whole incident in a less disruptive manner. However, both Betz and Doucette had reason to be irritated with each other, and this argument does not resolve the fundamental issue of credibility.

34. On the particulars of why we should prefer Doucette's evidence over the company witnesses, counsel pointed to the fact that Carlini told us that he started to write his notes about 10:00 the next day and that he just decided to write them down. Betz said he had asked him to do it the night before and Carlini neglected to tell us as well that Tolentino had spoken to him before he wrote his notes. Counsel concludes that Carlini is lying as shown by another company witness. He submits that it is very significant that he neglected to write in his statement the words setting out that he had heard Mark saying that he was refusing to do it while the line was running, which he testified to hearing.

35. Further, union counsel submits that Shtunyk's evidence is incredible because it stands for the proposition that Mark never mentioned health and safety at the same time as the company is saying that he is asserting his health and safety rights as an after-the-fact rationalization. This is

counter-balanced by Doucette's silence in the face of the presence of the President and Safety Committee Chair nearby. In the end the point is equivocal.

36. We find, on the balance of probabilities that we do not accept the complainant's version of events despite inconsistencies in the evidence of others as well. Although it is clear that the interaction between Doucette and Betz left much to be desired on both sides, we found Betz' version of the crucial element, whether or not he ordered Doucette to do the cleaning of the bottom head while the line was running, to be more credible, for a number of reasons.

37. We were not impressed with the complainant's ability to recall events or his ability to resist the influence of self-interest to modify recollections. Doucette could not remember a number of things which other witnesses remembered clearly and testified about in a straightforward manner. He could not recall going to Carlini's office on his second call for assistance and calling the senior operators lazy, or calling them names in his conversation with Betz. Nor could he recall the earlier incident with Carlini concerning the cleaning of the bottom heads and his assertion that it was the senior operators' job. However, he asserts that Schtunyk and Carlini had established that the senior operators were to do this work, and agreed that he had called senior operators names on previous occasions. In direct examination Doucette said he saw the senior operators on his way out, laughed, and said it was crazy. In cross-examination this had become a conversation of which he could not recall the precise contents, but which he had then mentioned to the safety committee. Betz' evidence was not subject to the same deficiencies. In general, Betz' evidence, that Doucette was trying to make a point about the senior operators' duties is more consistent with Doucette's admitted views on the matter than Doucette's version of events is with Betz's prior behaviour concerning health and safety matters, and the constraints of the company's policy on the safety of the matter.

38. We find that Doucette was of the view that he should not have to clean the bottom heads, although he did not deny that it fell within his job description and that he had done the job alone in the past. Although this is not determinative of the issue in the case, it suggests the existence of a motive other than health and safety motivation asserted to be the only one present. The written statements made by Carlini and Betz at the time, are both clear that Doucette had asserted, prior to the suspension, that it was not his, but the senior operators', job to clean the bottom heads. Doucette did not actually deny this; rather he said he assumed the senior operators would clean the bottom head because they usually do. It is clear that his concept of his usual help with the cleaning of the bottom head was that the senior operators did it and that he wanted the same to occur on this occasion. We have considered the possibility that the two supervisors colluded in their statements, which was at least indirectly suggested by the applicant, but have rejected it. The statements are sufficiently different in style, and insufficiently contradicted in content to be disregarded in their entirety. Furthermore, the fact that the management witnesses contradicted each other on certain issues suggests that collusion was not the central problem with the evidence. It is clear that Carlini's evidence was affected by things he could only have learned much later. He testified that Betz suspended Doucette for the shift and two days on the day Doucette was sent home, when the evidence is clear that this was not decided until the following day. In this context we find the fact that Carlini testified at the hearing that Doucette had mentioned the line running while on his way to the office to be inconclusive. Firstly, if it was said, it was after the fact of the suspension and proves nothing about the critical question of what work Doucette was ordered to do. Secondly, there is no reason to believe this was not also something Carlini learned later and now remembers as happening earlier.

39. The assertion by the union that there is significance to the fact that the senior operators did the very same unsafe work on the same shift falls short of counter balancing the other evi-

dence. The fact that Doucette had raised the matter earlier with the safety committee indicates there had been breaches, and there is no evidence that this was anything but another breach. The union did not allege that Betz told the senior operators to do the work while the line was running.

40. The allegation that Doucette was not allowed a steward by Schtunyk is basically irrelevant on the major issue of credibility as to what work he was ordered to do. As evidence of a pattern of misconduct, even if accepted, it falls short, as Doucette admits he was given a safety representative on his previous work refusal and did not contradict the evidence that Betz offered to take him to see Williams on the day in question, which we see as an offer of representation, or that Betz did not object to the presence of Leslie in the interview. However, we find it unlikely that Doucette was unable to raise or resolve this issue at the time, given his previous experiences.

41. It was not contended at the hearing that this was a case where the Board should exercise its discretion under section 24(7) of the Act and substitute another penalty for that imposed on Mr. Doucette; we have therefore not determined the matter.

42. We therefore find that the company has adequately explained its motivation in suspending the complainant and it has not acted contrary to section 24(1) of the *Occupational Health and Safety Act*. The complaint is therefore dismissed.

2045-88-FC National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) & its Local 303, Applicant v. Del Equipment Limited, Del Hydraulics Limited and Edinburgh Electric Limited, Respondents

Adjournment - Evidence - First Contract Arbitration - Practice and Procedure - Privilege - Board ruling that evidence of discussions between a mediator or conciliation officer and one of the parties was not admissible - Discussions involving Board Officer also not admitted - Admission would undermine the settlement process and the parties had agreed that the discussions were without prejudice - Respondent seeking an adjournment to retain other counsel because its own counsel would become a witness - Impossible to finish case within 30 day time limit - Time limits in section 40a(2) are directory not mandatory - Adjournment granted

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. G. Wozniak* and *K. V. Rogers*.

APPEARANCES: *Mary Hart*, *Ted Murphy*, *Rocco Gismondi* and *Tom McDonnell* for the applicant; *Stephen J. Shamie*, *Robert W. Little* and *David Martin* for the respondents.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER D. G. WOZNIAK; January 13, 1989

1. This application, under section 40a of *Labour Relations Act*, for a direction that a first collective agreement be settled by arbitration was filed on November 24, 1988.

2. Section 40a(2) requires that the Board consider and make its decision on an application under section 40a within thirty days of receiving it.

3. By letter from counsel, also dated November 24, 1988, the applicant requested that the application be heard together with or “consecutively with a sister application filed in respect of ... Unicell Canada”. The two applications were, in fact, scheduled to be heard consecutively as requested by the applicant, with the dates on which this matter was scheduled to be heard being December 15, 16, 19 and 20, 1988. Subsequently, December 21, 1988 was also scheduled for hearing by the panel.

4. The parties spent the entire first day scheduled for hearing meeting with one of the Board’s Labour Relations Officers in an attempt to resolve the disputes between them. Such settlement discussions often occur during the first and sometimes subsequent days scheduled for hearing of such applications. Because it is always preferable in labour relations matters, particularly in first contract situations, for parties to resolve their differences themselves rather than litigating them, the Board encourages such discussions. The Board’s officers have been very successful in assisting parties in such applications in reaching a resolution of the matters in dispute between them and the vast majority of such applications have been settled without it being necessary for the Board to adjudicate the dispute.

5. The parties were unable to settle the matter on December 15, 1988 and the hearing began on December 16, 1988. In the course of the examination-in-chief of Ted Murphy, the national representative of the applicant and the person who headed the negotiations with the respondent on its behalf, the Board was required to rule on two evidentiary matters. Because of the bearing these (unanimous) rulings may have on subsequent proceedings, the Board finds it appropriate to briefly set them out.

6. First, Mr. Murphy was asked a question with respect to the mediation process the parties went through. When he began to recount what a mediator said to him, the Board stopped him. Not only does evidence of one party’s conversations with a conciliation officer or mediator tend to undermine the settlement process in labour relations matters, but section 111 of the Act provides that no information or material furnished to or received by a conciliation officer or mediator shall be disclosed to anyone other than the Minister, the Deputy Minister of Labour or the chief Conciliation Officer of the Ministry of Labour. The Act gives the Board no discretion in this respect. (See *Co-Fo Concrete Forming and Construction Limited*, [1987] OLRB Rep. Oct. 1213; *Aristokraft Vinyl Inc.*, [1985] OLRB Rep. June 799; and *Shaw Almex Industries Limited*, [1984] OLRB Rep. Jan. 109.) Accordingly, the Board ruled that evidence of discussions between a mediator or conciliation officer and one of the parties was not admissible.

7. Second, the applicant also sought to adduce evidence of discussions between the parties on December 15, 1988; that is, the discussions involving the Board Officer in an attempt to settle the matter. Upon objection by the respondent, the Board ruled such evidence to be inadmissible but that evidence about the fact that such discussions took place was admissible. It is evident that evidence of the content of such discussions would be arguably relevant to the Board’s considerations in an application such as this. However, it was clear that the applicant had specifically agreed or acquiesced to the respondent’s stipulation that the discussions on December 15, 1988 be without prejudice and off the record. Accordingly, even though we are satisfied that the Board has the discretion to admit such evidence, it was, in the circumstances, inappropriate to do so both because it would tend to undermine the settlement process, and because of the agreement of the parties.

8. The hearing on December 16, 1988 was adjourned when counsel for the applicant concluded her examination-in-chief of Mr. Murphy. Apparently as a result of further discussions over the intervening weekend, the parties felt that further discussions might be fruitful because they

agreed to spend the entire day of December 19, 1988 again meeting with a Board Officer in a further attempt to resolve the matter.

9. On December 20, 1988, the parties appeared before the Board at which time the applicant took the position that the parties had in fact reached a collective agreement binding upon them and, because the respondent did not agree that that was so, the applicant wished to prove the settlement before the Board. The respondent, in addition to disputing that there had been a settlement, submitted that:

- (a) the Board did not have jurisdiction to entertain the applicant's "motion";
- (b) even if the Board did have jurisdiction to do so, the evidence the applicant sought to rely in support of its assertion was precisely the kind of evidence of without prejudice discussions which the Board had already ruled inadmissible and that the Board therefore could not, or, in the alternative, should not admit it;
- (c) if the Board did have jurisdiction and did admit the evidence, the prejudicial nature of the evidence was such that the applicant should file a separate complaint under section 89 of the Act so that the matter could, as the respondent asserted it should, be heard by another panel of the Board;
- (d) because Mr. Shamie (counsel for the respondent) would be a witness if the motion proceeded, the respondent would have to obtain further counsel to deal with both the respondent's objections thereto and, if necessary, the merits thereof.

10. There was no indication that the applicant had given the respondent any prior notice of its motion. Mr. Shamie was placed in the untenable position of being witness and counsel in the same cause. Mr. Shamie did try, unsuccessfully, to obtain such counsel on December 20, 1988. It appeared to us that as a matter of natural justice, the respondent was entitled to an adjournment. Indeed, although unhappy with the prospect of an adjournment, counsel for the applicant quite rightly conceded that the applicant could not, and in fact it did not, oppose an adjournment on that basis.

11. The applicant did, however, assert that the Board was required to complete the hearing within thirty days of receiving the application as stipulated in section 40a(2).

12. We observe that it is likely to take two to three days to hear and dispose of the applicant's motion and, if that motion is unsuccessful, a further eight to nine days to complete the hearing of the application on its merits. Accordingly, it would take up to twelve additional days to dispose of the matter. Because the Board cannot create hearing time out of the air, it was physically impossible to schedule that many days of hearing within the thirty days stipulated by the applicant. (When asked the applicant could offer no suggestions as to how the Board might accomplish such a feat.) Further, for the reasons expressed in paragraphs 14 to 23 of the *Nepean Roof and Truss Limited*, [1986] OLRB Rep. Sept. 1287, the time limits specified in section 40a(2) are directory, not mandatory.

13. We also observe that the parties and the Board found themselves in this "time limits" dilemma partly as a consequence of the applicant's own strategy.

14. It is evident that the legislation directs the Board to deal with applications for a direction that a first collective agreement be settled by arbitration expeditiously. There is no doubt that the maxim “labour relations delayed are labour relations defeated and denied” (see *Journal Publishing Co. of Ottawa Ltd. et al. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, March 31, 1977 (Ont. C.A.) unreported) is particularly applicable to first collective agreement situations. However, the Board cannot lose sight of all else in the pursuit of expedition. Surely, no one would suggest that the Board preclude settlement discussions between parties and require them to litigate such a matter. A resolution of labour relations dispute by agreement is always preferable to a litigated one, particularly in a first collective agreement situation which is an important step in the development of a workable relationship between the parties. Litigation is unlikely to do anything to foster stable labour relations. It is much more likely to have quite the opposite effect.

15. We note that even the applicant did not assert that the time limits imposed by section 40a(2) are mandatory, within the meaning of that term in law. It submitted only that the legislation requires or directs the Board to deal with applications like this expeditiously. The applicant went so far as to suggest that a decision rendered within 30 days of the lapse of the 30 day period specified by section 40a(2) is acceptably expeditious.

16. We also observe that if the time limits in section 40a(2) were mandatory, the Board would be placed in a position of having to adjourn other previously scheduled proceedings to accommodate the scheduling of at least some applications like this. Notwithstanding the need for expedition in first collective agreement situations, we are not persuaded that the labour relations of other parties should necessarily take a back seat to a stranger’s application under section 40a.

17. The legislation is silent with respect to what results if the the Board is unable to meet the time limits specified in section 40a(2). We cannot accept the suggestion of Board Member Rogers that an applicant is entitled to a direction that a first collective agreement be settled by arbitration if the Board is unable to complete a hearing and issue a decision with respect to its application within the 30 day period specified by section 40a(2), regardless of the stage of the proceeding and notwithstanding that the respondent may have had an incomplete or, as in this case, no opportunity to make its case. To have the legislation operate in such a draconian manner would make a mockery of natural justice and fairness, and would be inimical to the development of good labour relations between the parties. The legislation does not specifically abridge the rules of natural justice or fairness, and where the legislation has not specified any result, much less such a startling one, we cannot accept this was its intent.

18. Further, if the time limits are mandatory, the Board would, in our view, be without jurisdiction to continue to deal with an application with respect to which it did not make a decision within 30 days of receiving it. Such a result would do nothing to resolve the labour relations problems of the parties involved and would not likely be welcomed by an applicant. Indeed, such a result would be the antithesis of sound labour relations policy and could not have been intended by the legislature.

19. This situation also points out the problems with a legislated time limit which stipulates that a tribunal make a decision within a specified time from the date it receives an application. Surely, it would be more sensible to require the Board to appoint a date for and hold a hearing within a specified time of receiving an application (similar to the provisions in section 124(2) of the Act) and further require the Board to make its decision within a specified time of the conclusion of the hearing. Whatever the wisdom of the present legislation, however, it does exist and must be interpreted and applied by the Board as it stands.

20. We also find ourselves constrained to comment on two other aspects of our colleague’s

dissent. First, it is, in our view, extremely premature and inappropriate to make any comment on the merits and ultimate disposition of this application. Second, it is somewhat incongruous, curious, and also contrary to Board Member Rogers' assertion, for the applicant to assert that the parties have reached a collective agreement, but also continue to press this application. Section 40a(1) permits an application for a direction that a first collective agreement be settled by arbitration to be made only in circumstances where the parties have been unable to effect one through their own negotiations. In our view, asserting that arbitration should be directed and that an agreement already exists is not unlike an applicant for certification asserting that the Board has no jurisdiction to entertain its own application.

21. In the result, at the hearing on December 21, 1988, the Board adjourned the application to January 26, 1989, its first available date in that regard. The Board also scheduled February 6, 7, 22 and 25, 1989 for hearing and indicated that it would set further dates after consulting with the Registrar. As it turned out February 25, 1989 is a Saturday. Accordingly, no hearing will be held on that date. The Board directs the Registrar to schedule this matter for hearing on the following dates: January 26, 27, 31; February 3, 6, 7, 9, 10, 22, 23 and 24 all of 1989, and day-to-day thereafter as may be directed by the Board, or on such additional or other dates which can be scheduled to accommodate the expeditious hearing of the application. The hearings are all to begin at 9:00 a.m. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application.

22. We note that at the hearing on December 21, 1988 the applicant advised the Board that it intended to file a complaint under section 89 of the Act alleging a breach of section 15, and that, while it reserved a right to change its mind in this respect, to ask that such a complaint be consolidated with this application. The respondent advised that its position was, notwithstanding that it had indicated an intention to object to this panel hearing the applicant's motion with respect to the same matter (see paragraph 9, above), that consolidation was appropriate. In our view, any such issue can only be dealt with when it arises.

DECISION OF BOARD MEMBER K. V. ROGERS: January 13, 1989

1. In assessing the situations involved in the proceedings, I am unable to disagree with the decision to adjourn the application in order to provide Stephen J. Shamie, Company Counsel, the opportunity to seek his own legal counsel. The necessity for Mr. Shamie to obtain counsel arises from position of the applicant as noted in the majority decision at page 3-#9.

2. However, I am of the opinion the majority decision, which finds the time limits of Section 40.(2) are directory only, is flawed.

3. It is my belief that a total assessment of the Ontario *Labour Relations Act*, and its development, leads to the conclusion that Section 40.a.(2) was intended to give the Board authority to act quickly to bring an end to unresolved issues arising during first-round bargaining. The urgency of each situation needs to be assessed but the legislation clearly allows the Board to bring hearings to a rapid conclusion once the applicant has submitted sufficient evidence to meet *any* of the criteria and which envisioned by Section 40.a.(2) and such evidence will result in a decision by the Board to order arbitration of a first agreement.

4. To reach any other conclusion would lead to a result that the applicant must show unreasonable intransigence by the respondent in each case, with such positions being somewhere between bargaining in good faith and being in violation of Section 89, that is, bargaining in bad faith.

5. Clearly, the reason for the latitude allowed the Board in Section 40.a.(2).d is to bring to a conclusion conflict where a prolonged work stoppage continues despite the efforts of both parties, the full utilization of conciliation and mediation, the best efforts of a Labour Relations Officer, and a Section 40.a.(2) application.

6. It may be relevant in some circumstances that the actions of the parties are considered by the Board. However, the actions of either the applicant and/or the respondent need not be considered by the Board in every Section 40.a.(2) application.

7. As noted on page 4-#14, litigation may not foster stable labour relations but to allow a prolonged work stoppage to continue is not a logical alternative.

8. It is only with the mandatory time limits of Section 40.a(2) and the latitude of authority given the Board to direct arbitration that the employees are ordered back to work with protected rights of the act and the path of stable labour relations is set out by the Board for the parties to follow.

9. The strategy of the applicant in negotiations as noted in the majority decision may have added to the difficulty in issuing a decision within the time limits of the Act but surely the position taken by the applicant that the respondent had resiled in an agreement reached December 19, 1988, leads to both the need for adjournment of the applicant and the additional time required to conduct hearings.

10. Such assertions, if subsequently proven, are precisely the reasons why time limits must be mandatory to avoid prolonged hearing procedure during a period when a work stoppage is occurring and the applicant has asserted failure to reach the first agreement, regardless of reasons.

11. Therefore, if the applicant had not asserted an agreement had been reached on December 19, 1988, it would be my opinion the Board had both the obligation and authority to render a decision within the time limits specified in 40.a.(2).

12. It may well be argued that Section 40.a.(2).d:

“... that the process of collective bargaining has been unsuccessful because of ...(d) any other reason the Board considers relevant.”

gives the Board latitude to issue a decision within thirty (30) days, despite the intent of either the applicant or respondent to introduce, or rebut, evidence which the Board considers extraneous to its ability to make a decision.

13. In conclusion, I would have determined that Section 40.a.(2) applications must be decided within thirty (30) days in circumstances where the application continues to maintain a position that negotiations have failed and will continue to fail despite the efforts of the parties to achieve an agreement.

1067-88-G; 1068-88-G; 1465-88-JD United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Dufferin Construction Company**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. The Foundation Company of Canada Limited, Respondent; Labourers' International Union of North America, Local 183, Complainant v. Dufferin Construction Company, a Division of St. Lawrence Cement Inc. and United Brotherhood of Carpenters and Joiners of America, Local 27, Respondents

Jurisdictional Dispute - Practice and Procedure - Sector Determination - Whether work in dispute falls within ICI sector - Project involving the construction of a passenger terminal building at the airport - Specific work in dispute involving the departures level bridge - Board setting out its reasons for directing that notice of the s.150 proceeding be given to any person having a direct connection with the Terminal 3 site project - Decision in a s.150 proceeding has province-wide application if work characteristics are to determine whether the work falls within a particular sector - Notice should be given to the widest practical constituency

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Douglas J. Wray* and *Lorenzo Monaco* for United Brotherhood of Carpenters and Joiners of America, Local 27; *Joseph Liberman* and *Brian Harrop* for Dufferin Construction Company; *Carl Peterson* and *Denis Flynn* for The Foundation Company of Canada Limited; *Bernard Fishbein*, *Michael Reilly*, *Tony Dionisio* and *Roger Quinn* for Labourers' International Union of North America, Local 183; *Joseph Liberman* for The Heavy Construction Association of Toronto; *Carl Peterson* for the Airport Development Corporation.

DECISION OF THE BOARD; January 25, 1989

1. These three files raise a question of whether the work in dispute in each of them is work coming within the industrial, commercial and institutional (ICI) sector of the construction industry. It is common ground that the question must be determined by the Board pursuant to section 150 of the *Labour Relations Act*, *infra*. The Board issued decisions dated November 4 and December 20, 1988, directing the parties to meet with a Board officer for the purpose of preparing a list of persons who, in the parties' view, ought to receive notice of the proceeding under section 150 of the Act. In its December 20th decision the Board determined also that, for reasons to be given later, the list was to include any person having a direct connection with the Terminal 3 Site project of the Airport Development Corporation at Pearson International Airport ("the Project"); that is, any employer of employees who are working or will work on the Project, any trade union or council of trade unions which has bargaining rights for employees who are working or will work on the Project, any employee bargaining agency, employer bargaining agency, affiliated bargaining agent or employers' organization which represents employees, employers or trade unions as aforesaid.

2. The Project includes the construction of a passenger terminal building; a parking garage; a departures level bridge, located between the terminal building and the garage, the access and exit ramps for the departures bridge; an apron area in front of the terminal building; six road bridges and the road work related thereto which will provide access to and exit from the airport property.

3. All of the parties except the United Brotherhood of Carpenters and Joiners of America, Local 27 ("the Carpenters"), had taken the position that standing in the section 150 proceeding should be limited to those persons having a direct connection with the construction of the depar-

tures level bridge for the terminal, together with its access and exit ramps. That is the specific work in dispute which has given rise to the need for a section 150 determination. It had been the Carpenters' position that persons having a direct connection with the Project should have standing. This decision sets out the Board's reasons for directing that notices of the section 150 proceeding be served on persons having a direct connection with the Project.

4. Counsel for the Carpenters argues that, were the Board to limit standing in the proceeding to persons having a direct connection with the departures bridge and its ramps, it would be setting aside all of its jurisprudence beginning with the first decision dealing with the issue of standing in a section 150 proceeding. That decision was *Harbridge & Cross Ltd.*, [1979] OLRB Rep. April 313. It was a decision in which the Board decided that, when a question arose which needed to be decided under section 150, standing in the proceeding should not be limited to those parties to the matter which gave rise to the question and that "...the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under [section 150]". The other parties do not dispute that the Board has consistently taken that position since its decision in *Harbridge & Cross* whenever it has been required to make a determination under section 150 of the Act. They contend, however, that the Board's decisions do not describe the scope of the "project" and none of its reported decisions reveal there ever to have been a dispute over the scope of the project which would form the basis for deciding what persons should be given standing in section 150 proceedings.

5. The Board was referred by one or more of the parties to many of its decisions dealing with the question of standing in a section 150 proceeding which have issued since *Harbridge & Cross*, *supra*. These included *West York Construction*, [1980] OLRB Rep. Jan. 119; *Teperman & Sons Limited*, [1981] OLRB Rep. June 788; *Ellis-Don Limited*, [1985] OLRB Rep. Aug. 1204; *Armbrro Materials & Construction Limited*, [1986] OLRB Rep. May 579 (*Armbrro Materials #1*); *Steen Contractors Limited*, [1987] OLRB Rep. Jan. 137; and, *The Board of Governors of Exhibition Place*, [1988] OLRB Rep. June 560.

6. The Board has reviewed the full submissions of the parties about what should be the project which becomes the point of departure for deciding the what persons are to have standing in the section 150 proceedings and the Board's decisions to which they have referred in making their submissions. While none of the decisions relied on are directly on point with the issue which is before the Board in the instant case, the Board finds them useful for deciding that issue.

7. The decisions beginning with *Harbridge & Cross*, *supra*, make it abundantly clear that the Board considers section 150 of the Act to affect the interests of parties beyond those who are the direct parties to the dispute which gave rise to the question of whether particular work fell within the ICI sector of the construction industry, and that the project on which that question arose should be the point of departure for deciding who should be given standing to participate in the proceeding in which that question would be answered. The parties herein opposed to the Carpenters' position do not dispute that. They do claim, however, that, for the purpose of deciding the standing issue in the instant case, the project should be limited to the departures level bridge and its entrance and exit ramps and only persons having a direct connection with the construction thereof should have standing. That is the only work which is in dispute and, their argument goes, to include all of the work sought by the Carpenters would be to include persons who have a direct interest in work which is not in dispute and have no direct interest in the work which is in dispute. Therefore, in their view, the only persons who employ employees who are working or will work on the project as they define it; trade unions or council's of trade unions which have bargaining rights for employees who are working or who will work on the project; employer bargaining agencies,

employee bargaining agencies and affiliated bargaining agents which represent those employers, trade unions or employees just referred to should be given standing.

8. The sections of the Act relevant to the question of standing are clause (e) of section 117 and section 150, respectively. They provide as follows:

117. In this section and in sections 118 to 136,

• • •

- (e) “sector” means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

• • •

150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

9. The Board's decision in *Harbridge & Cross, supra*, commented as follows at page 314, paragraphs 8 and 9, about the issue of standing in a section 150 proceeding:

8. Section 135 [now section 150] clearly indicates who may make an application and refers to “work performed or to be performed by employees”. It appears to the Board that the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under [section 150].

9. In our view, in order for a person to have standing to participate in a proceeding under [section 150] such a person is required to have a direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or councils of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or employees previously referred to in this paragraph.

The Board went on to direct the parties to the grievance referral in which the section 150 issue arose to meet with a Board officer “..., in order to prepare a list of the persons who are, in their view, to receive notice of this application.”. The Board has closely followed that approach in all subsequent reported decisions dealing with the question of standing in a section 150 proceeding. From its first decision dealing with the standing issue, then, the Board clearly has seen section 150 as potentially affecting the interests of persons beyond those who are parties to the proceeding under which the section 150 issue arose and that such persons should have notice of the section 150 proceeding.

10. It would appear from the Board's reported decisions that parties have not previously had any problem in defining the scope of the project which would form the point of departure for determining the standing question. At least, there appears to be no reported case where the Board has been required to make such determination. They remain useful to the Board, however in deciding the dispute now before it because it can be seen from some of the decisions that the

“project” was not narrowly limited to some segment of a larger project. Examples of this are found in the *Armbro Materials #1* and *Steen Contractors* decisions, *supra*. In *Armbro Materials #1* the work in dispute was the installation of site services from the property line to the building line at the *Honda Plant Building Project* at Alliston, Ontario. In the *Steen Contractors* decision, the work giving rise to the section 150 proceeding was the installation of storm sewers and catch basins within the property lines and outside the perimeter of the buildings at the *General Motors Stamping Plant Construction Project* in Oshawa, Ontario. In both cases it was argued by one or more of the parties that the Board should limit standing to those parties having a direct connection with a segment of the project on which the disputed work was being performed. The Board rejected their arguments and followed the Board’s earlier practice of giving standing to persons having a direct connection with the entire project. In so doing, the Board continued to recognize the potential, wide spread impact of a section 150 determination.

11. That potential is evident in the Board’s decision in *Armbro Materials & Construction Limited*, [1987] OLRB Rep. July 948 (*Armbro Materials #2*). In that case, the Board was dealing with the merits of the section 150 determination raised in *Armbro Materials #1*. The Board was being asked to hear evidence of area practice for purposes of making its determination under section 150 of the Act because, it was argued, “...the key to a determination under section 150 was to ascertain how the trade unions on a project have treated the project in terms of area practice.”. The Board rejected that argument as inconsistent with the legislative intention of sections 117(e) and 150 because it would introduce variables of area and trade union practices to sector determinations and would lead to sectors being defined differently for different geographic areas and/or trades. The Board decided that labour relations would be served best by not making those distinctions. Therefore, since clause (e) of section 117 of the Act defines a sector of the construction industry as “... a division of the construction industry as determined by work characteristics.”, the Board went on to rule that it would “...entertain evidence of the work characteristics...” of the work in dispute.

12. It is the view of the Board herein that the decision in *Armbro Materials #2* stands for the proposition that, if work characteristics are to determine whether work falls within any one of the sectors named in clause (e) of section 117 of the Act, the result would be the same regardless of the trade or trades performing the work, or the geographic area in which it was being performed. Therefore, a decision that the work at issue in a section 150 determination is or is not, by its work characteristics, in the ICI sector of the construction industry has province-wide application. Such a result points in favour of giving notice of a section 150 proceeding to the widest practical constituency in the circumstances of the case. That is what the Board appears to have done in *Harbridge & Cross, supra*, when it decided “...that the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under [section 150].” and that “..., in order for a person to have standing to participate in a proceeding under [section 150] such a person is required to have a direct connection with the project wherein the question arises or will arise.”.

13. The widest practical constituency in this case would be all persons who have a direct connection with the project as described herein at paragraph 3. It was that conclusion which led the Board to make the declarations and directions set out in paragraphs 4 through 8 of the decision which issued December 20, 1988.

2191-88-R Hotel and Restaurant Employees' and Bartenders' Union, Local 604 AFL-CIO, OFL-CLC, Applicant v. 408762 Ontario Limited o/a Montreal House, Respondent

Abandonment - Bargaining Unit - Certification - Applicant holding bargaining rights for both full and part-time employees in 1976 - Applicant agreeing to exclude some of these employees from the collective agreements negotiated since then - Applicant not actively seeking to represent these employees - Employer arguing that applicant can only regain bargaining rights for these people at the bargaining table - Board finding that bargaining rights abandoned - No legal bar to certification application - Certificate issuing

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *Gerry Ellis* and *Harry A. Lavoie* for the applicant; *Paul Warner* for the respondent.

DECISION OF THE BOARD; January 26, 1989

1. The name of the respondent appearing in the style of cause of this application is amended to read: "408762 Ontario Limited o/a Montreal House".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. In its application the applicant requested that it be certified to represent a bargaining unit comprised of all employees at the Montreal House in Peterborough, save and except managers, persons above the rank of manager and those covered by existing collective agreements. The applicant and the respondent agree that the applicant is currently the bargaining agent for all employees of the Montreal House below the rank of assistant manager, except for those regularly employed for not more than fourteen hours per week.
5. In 1965 the applicant was certified by the Board to represent a unit of employees at the Montreal House, which was then being operated by Loucks (Peterborough) Limited. The bargaining unit was restricted to waiters, bartenders and tapmen, and excluded persons regularly employed for not more than 24 hours per week. In June of 1976, when the Montreal House was operated by the Branahasi Restaurant Ltd., the applicant was issued a second certificate by the Board. The bargaining unit described in this certificate encompassed all employees at the Montreal House save and except those of the rank of assistant manager and above and persons covered by existing collective agreements.
6. The details of the 1976 certification proceedings are not before us. Presumably the exclusion of persons covered by existing collective agreements was referable to waiters, bartenders and tapmen working more than 24 hours per week for whom the applicant already held bargaining rights. The 1976 certificate apparently covered a bargaining unit comprised of employees other than waiters, bartenders and tapmen, as well as those waiters, bartenders and tapmen who were working not more than 24 hours per week.
7. Following the issuance of the 1976 certificate the parties did not negotiate separate collective agreements for each of the two bargaining units. Instead they negotiated a series of agree-

ments covering a single bargaining unit. This bargaining unit encompasses part, but not all, of both of the previous units. The current collective agreement between the parties, with a term of September 1, 1987 to August 31, 1990, describes the bargaining unit as follows:

The Employer (Montreal House) recognizes the Union as the sole collective bargaining agent of all employees employed by the Employer within the areas of recognition as per the Ontario Labour Relations Board Certificates dated September 28, 1965 and June 1, 1976 at its Montreal House at Peterborough, Ontario save and except assistant manager, persons above the rank of assistant manager, and persons regularly employed for not more than fourteen (14) hours per week.

The parties are in agreement that the exclusion of persons regularly employed for not more than fourteen hours per week has been in every collective agreement entered into by the parties subsequent to the issuance of the Board's certificate in 1976.

8. Subsequent to 1976 the parties did not treat employees working fourteen or fewer hours per week as being covered by their collective agreements. In negotiations leading up to the most recent collective agreement the union requested that the scope clause of the agreement be amended so as to bring employees working not more than fourteen hours per week within the bargaining unit. The respondent refused to agree to the proposed amendment.

9. At the hearing, the applicant indicated that until recently it believed that it had retained the bargaining rights for all part-time employees. The respondent, however, took the position that in the first negotiations after the issuance of the 1976 certificate the applicant bargained away its bargaining rights for employees regularly employed for not more than fourteen hours per week. The respondent contends that if the applicant wishes to again represent these employees, it can do so only by raising the issue at the bargaining table during negotiations for the next collective agreement.

10. As indicated above, as of June 1976 the applicant held bargaining rights for both full and part-time employees at the Montreal House. By agreeing to exclude those employees working not more than fourteen hours per week from the scope of the bargaining unit, however, and then not seeking to actively represent them in a separate unit, the applicant effectively abandoned its rights to represent them. See: *York-Finch General Hospital* [1987] OLRB Rep. April 641. Once the applicant abandoned its bargaining rights with respect to these employees no legal bar existed to stop the applicant, or any other trade union, from filing an application to become their bargaining agent. See: *Dominion Cellulose Limited*, [1974] OLRB Rep. March 114.

11. We cannot accept the respondent's contention that the only way for the applicant to re-acquire bargaining rights with respect to the employees in question is at the bargaining table. While it is open to the parties, subject to certain limitations, to agree to expand the scope of the bargaining unit, the applicant would have no basis for complaint if the respondent refused to do so, as it did during the last round of negotiations. Equally, the applicant would not be entitled to engage in strike action so as to force the respondent to agree to expand the scope of the unit. See: *Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776. In addition, section 5 of the *Labour Relations Act* indicates that where a group of employees are unrepresented, a union can apply to be certified to represent them at any time. The previous dealings between the parties cannot serve to over-ride this provision.

12. Having regard to the foregoing, we find this to be a timely application for certification with respect to those employees of the respondent regularly employed for not more than fourteen hours per week. In line with this finding, and the Board's general approach to describing bargaining units of part-time employees, the Board finds that all employees of the respondent regularly

employed for not more than fourteen hours per week at its Montreal House at Peterborough, Ontario, save and except assistant manager and persons above the rank of assistant manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The respondent did not file a list of bargaining unit employees. At the hearing, however, the respondent advised the Board that as of the application date there were three individuals regularly employed at the Montreal House for not more than fourteen hours per week. The respondent also advised the Board of the names of these three individuals. Prior to the terminal date, the applicant filed acceptable evidence of membership with respect to the two of the three individuals. In these circumstances, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 19, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue.

2263-86-R National Capital Road Builders Association, Applicant v. International Union of Operating Engineers, Local 793 and International Brotherhood of Teamsters Union, Local 91, Respondents v. The Operating Engineers Employer Bargaining Agency, Intervener #1 v. The Labourers Employer Bargaining Agency, Intervener #2

Accreditation - Construction Industry - Practice and Procedure - Board not compiling a Final Schedule "F" - Schedule consists of employers for whose employees the union has bargaining rights but who have not employed any of the represented employees within the prior year - Neither the number or identity of these employers is a factor in the Board's determination of whether the applicant should be accredited but applicant would have bargaining rights for these employers - Issue of whether these employers are bound by the accreditation order can be determined where a denial of bargaining rights arises in subsequent litigation - Unions agreeing to fulfil specific notice obligations and to waive any claim to damages in the first claim against each of these employers - Accreditation certificates issued for all employers of employees engaged in the operation of heavy equipment and truck drivers in the roads, sewers and watermains, and heavy engineering sectors in the Ottawa area

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. Trim* and *C. A. Ballentine*.

APPEARANCES: *Walter T. Langley* and *William Scott* for the applicant; *S.B.D. Wahl* for the respondents; *Joe Liberman* for interveners #1 and #2, *Sarnia Construction Association* and its members, *Canadian Dredge and Dock Company*, *Milne and Nichols Ltd.*, *Pigott Construction Ltd.*, *Greenspoon Brothers Ltd.*, *Alnor Earthmoving Ltd.*, *Moffat Construction Inc.*, *Bot Construction*, *Todglen Construction*, *Con-Eng Contractors Inc.* and *O. J. Gaffney*; *Carl W. Peterson* for *Mastercraft Bridge & Engineering Construction (Ottawa) Ltd.* and *Spie Construction Inc.*; *Daniel Fryzuk* for *Armbro Materials & Construction Ltd.*; *Werner O. Schmidt* for *Blier Inc.*; *Richard J. Nixon* for *Paul Daoust Construction Ltd.*; *Walter Pashnicki* for *Permanent Concrete*; *Robin B. Cumine* for *Steinberg Inc.* and *The Ontario Erectors Association*.

DECISION OF THE BOARD; January 17, 1989

1. The style of cause of this file has been amended by deleting as a respondent Labourers International Union of North America, Local 527, pursuant to paragraph 5 of the Board's decision in these matters dated January 29, 1988.

2. This file contains two applications for accreditation, one with respect to the employers of employees for whom the International Union of Operating Engineers, Local 793 is the exclusive bargaining agent, and the other for employers of employees for whom the International Brotherhood of Teamsters Union, Local 91 is the exclusive bargaining agent. The Board has found in prior decisions in these matters that the applicant had satisfied all of the requirements of section 127 of the *Labour Relations Act* with respect to each of those applications and is in a position to be accredited as the exclusive bargaining agent for:

- (1) all employers of employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same for whom the International Union of Operating Engineers, Local 793, has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell; and
- (2) all employers of truck drivers for whom the International Brotherhood of Teamsters Union, Local 91 has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.

3. For ease of reference the Board will refer to the two trade unions named in the bargaining units, respectively, as the "Engineers union" and the "Teamsters union". The Board did not accredit the applicant, however, because of an outstanding issue. The issue, as it was stated to the Board, is whether the Board, in the process of disposing of applications for accreditation, is required to continue or should continue the practice of compiling a list of employers referred to in accreditation decisions issued by the Board as Final Schedule "F". The employers who are named on that list are those employers for whose employees the trade union respondent to the application has been found to hold bargaining rights covering the relevant geographic area and sector or sectors of the construction industry, but who have not employed any of the represented employees within the year prior to the date of making of the application. For reasons which will be explained later in the decision, however, neither the number of employers on this list nor their identity is a factor in the Board's determination of whether an applicant should be accredited, in the words of subsection 127(2), "... as the bargaining agent of the employers in the unit of employers". Therefore, the issue for the Board in these applications is more correctly stated as whether the Board is required to or should determine the number and identity of those employers for whose employees the respondent trade unions held bargaining rights in the geographic area and sectors of the construction industry by which the bargaining units have been described, as at the date of making of the application, but who have not had operating engineers or truck drivers in their employ in that area and those sectors within one year prior to that date. Those employers would be in the units of employers but would not be part of the count of employers for purposes of deciding whether the applicant herein should be accredited. The applicant, if accredited, would be the exclusive bargaining agent of *all* employers in the units of employers, including those who were not part of the count

of employers. Reference is made to the issue at paragraphs 11, 12 and 13 of the Board's decision which issued January 29, 1988.

4. The same issue is present in a companion application for accreditation by this applicant in Board File No. 2153-87-R. In that file, the Board has found the applicant to be in a position to be accredited for a unit of employers for the same sectors and geographic area as this application. The unit was with respect to all employers of construction labourers for whom the Labourers International Union of North America, Local 527, has bargaining rights in those sectors and that geographic area. A certificate of accreditation and an accreditation order was not issued for that unit either because of the Final Schedule "F" issue. The application also involved a common issue of whether certain collective agreements on which Local 527 and Local 793 were relying created bargaining rights in the sectors and geographic area by which the unit of employers has been described. The files were listed for hearing together on these issues. Notices of hearing were given to all employers and other interested parties that the Board would be receiving evidence and representations respecting those issues in both applications. For reasons given later in the decision, the Board did not receive the submissions on the bargaining rights issue, but it did receive their submissions on the Final Schedule "F" issue and reserved its decision.

5. The respondent trade unions in the two files are represented by the same counsel. He had raised the issues in both files in the following terms:

...lengthy proceedings in order to compile an exhaustive Schedule "F" may be required in light of the Board's determinations in *Valentine Enterprises Contracting* and *John Hayman & Sons Limited*. It is the submission of the Respondents that the Board, in issuing a Certificate of Accreditation with [respect] to the appropriate bargaining unit need not list the contractors bound by the Accreditation Certificate. There is no requirement in the Act or the Rules of Procedure that requires a listing of the employers bound under the resultant certificate. In effect it is the submission of the Respondents that the Board ought not engage in lengthy and expensive hearings with respect to the existence of bargaining rights in the affected sectors of the construction industry relating to particular contractors who deny the existence of such bargaining rights. It is sufficient that the Accreditation Certificate be expressed in terms of,

... All employers for whom the [union] holds bargaining rights as of [the date of application] and for such other employers for whose employees the trade union may obtain bargaining rights through certification or voluntary recognition thereafter.

This would obviate the necessity of conducting hearings to determine the inclusion of any particular contractor on Schedule "F". The determination of these individual issues relating to particular contractors would be left to circumstances in which a denial of bargaining rights arises in a subsequent litigation context between the parties. Accordingly should our representations be endorsed by the Board the lengthy hearing process with respect to Schedule "F" would not be required.

Further, it is respectfully submitted that the Notice to Employers of this Application for Accreditation ought to specifically draw the attention of the Employer to this issue and specifically state that in the absence of a reply that specifically addresses the matter and/or in the absence of filing any reply at all, the Board may determine to proceed with this application and not conduct any hearings as to the existence of bargaining rights affecting the Employer which will be an issue left to arise in the course of subsequent litigation between the parties.

6. The Engineers union claims that its bargaining rights for employees in the sectors and geographic area found by the Board to be appropriate for the application are not limited to those contained in the collective agreement between the applicant and an uncertified council of trade unions representing the three respondent trade unions (hereafter referred to as "the Agreement"), or any agreements signed with individual employers which pick up the Agreement. The Engineers

union claims bargaining rights for employees in those sectors and that geographic area under each of the following collective agreements to which it is either a party or by which it is bound:

- (1) The Operating Engineers Provincial Agreement for the industrial, commercial and institutional ("ICI") sector, including independent general contractors who are direct parties with Local 793 to a pick-up agreement for the ICI Provincial Agreement;
- (2) The Utility Contractors Association of Ontario Provincial Collective Agreement;
- (3) The Operating Engineers Mainline Pipeline Agreement for Canada;
- (4) The Operating Engineers Distribution Pipeline Agreement for Canada; and
- (5) The Lambton County Sewer, Watermain and Roadbuilding Agreement between Local 793 and individual contractors.

Its claim is based on the proposition that the scope clauses in those agreements include the relevant sectors and geographic area, or they contain "cross-over" clauses which have the effect of extending the bargaining rights of the union parties to those five agreements to include the bargaining rights in the Agreement. The Engineers union contends, therefore, that employers who are bound to those agreements would be bound also by any accreditation certificate which issues to the applicant in this matter.

7. The Engineers union has claimed bargaining rights pursuant to the Agreement and the five collective agreements identified in paragraph 6 above for the employees of, and the Board sent notices in Form 93 - Notice to Employers of Application for Accreditation, and of Hearing, Construction Industry, to 492 employers as follows:

<u>No.</u>	<u>Employer Name</u>
1	Armbro Materials & Construction Ltd.
2	Beaver Asphalt (Ontario) Limited
3	Beaver Asphalt Paving Company Limited
4	Beaver Construction Group Limited, Beaver Construction Ontario Division
4(a)	Beaver Pipeline Construction
5	Dibblee Construction Limited
6	Dufresne Piling Company (1967) Ltd.
7	Fix-Fast Ltd.
8	W. D. LaFlamme General Contractors Ltd.
9	H. J. McFarland Construction Co. Ltd.
10	S. McNally & Sons Limited
11	Gordon Mulligan Construction Ltd.
12	O'Leary's Limited
13	Taggart Construction Limited
14	Vallance & Levy Engineering Contractors
15	S & D Equipment Rental Ltd.
16	Bandiera and Associates Inc.
17	A-1 Fabricating & Welding Ltd.
18	A.M.I. Steego A Division of McKerlie-Millen Inc.
19	Aavon Crane Service Limited
20	Acco Contracting Co.

- 21 Ace Crane Service Ltd.
- 22 Acme Crane Rentals
- 23 Acres Davy McKee Ltd.
- 24 Action Pile & Construction Co. Ltd.
- 25 Adams Crane Service Ltd.
- 26 Air Crane Rental & Equip. Ltd.
- 27 Aktron Steel Ltd.
- 28 Alanex Corporation Limited
- 29 William Albert Land Clearing
- 30 Aldershot Industrial Installations Ltd.
- 31 Alert Crane Service Ltd.
- 32 Allied Conveyors Limited
- 33 Alnor Earthmoving Limited
- 34 Ambler-Courtney Limited
- 35 Amco Crane Ltd.
- 36 Amherst Crane Rentals Ltd.
- 37 Amherst Pumping Co. Ltd.
- 38 Anchor Shoring Limited
- 39 Andco Anderson Limited
- 40 Annac Construction Ltd.
- 41 412239 Ontario Ltd. c.o.b. Archer's Crane Service
- 42 Ar-Way Welding (1972) Limited
- 43 Arlington Crane Service Ltd.
- 44 Assinch Bros. Limited
- 45 Arva Crane Ltd.
- 46 Astro Crane Services Limited
- 47 Atlas Concrete Pumping Ltd.
- 48 Aztec Contracting Limited
- 49 B & P Installations & Services Ltd.
- 50 B & W Crane Rentals
- 51 B. G. & Sons Concrete Pumping
- 52 N. Babock & Son Crane Service
- 53 Batten Erectors Limited
- 54 Baxter's Crane Service
- 55 Boom Trucks Ltd. & Bay City Crane
- 56 Beck's Construction Management Ltd.
- 57 Bedard Girard Enterprises Div. of B.G. Checo International Ltd.
- 58 Bellai Brothers Ltd.
- 59 Belmont Crane Ltd.
- 60 Birmingham Construction Limited
- 61 Bingley Steel Works Limited
- 62 Blenkhorn & Sawle Limited
- 63 Bluebird Construction 515112 Ontario Ltd.
- 64 Bob's Crane Service
- 65 Border Cities Wire & Iron Ltd.
- 66 Bot Construction (Canada) Ltd.
- 67 Brevandale Construction Ltd.
- 68 Bridge & Tank Div. of York Russel Inc.
- 69 Brikon Masonry Inc.
- 70 Broer Crane Service
- 71 Burlington Crane Ltd.
- 72 Burlington Mechanical Installations Ltd.
- 73 Caledon Steel Erectors Ltd.
- 74 Calorific Construction Ltd.
- 75 Cameron Crane & Riggers Inc.
- 76 Canadian Dredge & Dock Inc.
- 77 Canadian Erectors Limited
- 78 Canadian Longyear Limited
- 79 Canadian Machinery Movers
- 80 Canal Contractors (Division of Canadian Shipbuilding & Engineering Ltd.)
- 81 397028 Ontario Limited Cannon Enterprises

- 82 Canron Inc. Eastern Structural Div.
- 83 Carr Steel Const. Ltd.
- 84 370407 Ontario Ltd. o/a Cast Crane
- 85 Cem-Al Erectors Ltd.
- 86 Centennial Crane Ltd.
- 87 Central Bridge Co., Div. of TIW Industries Ltd.
- 88 Central Rigging & Contracting Ltd.
- 89 436033 Ontario Inc., o/a Chemfab Mechanical Contractors
- 90 Chrisken Construction Co. Ltd.
- 91 Adam Clark Company Ltd.
- 92 Cleland Metal Products Ltd.
- 93 Coastal Steel Construction Ltd.
- 94 Collins Pumping Co.
- 95 Commercial Contracting Corporation of Canada, Limited
- 96 Common Construction Company Ltd.
- 97 Comstock International Ltd.
- 98 Conaquip Limited
- 99 Conbrad (1970) Limited
- 100 Con-Drain Co. Ltd.
- 101 Con-Elco Ltd.
- 102 Cooper's Crane Rental Limited
- 103 Craib Construction Ltd.
- 104 Cooper's Crane Rental (1982) Ltd.
- 105 Craneyway Ltd.
- 106 Crescent Crane Service Div. of 3692982 Ontario Ltd.
- 107 Cross Country Concrete Pumping Ltd.
- 108 Art Currie Ltd.
- 109 Custom Crane Service
- 110 Dangro Construction Service Ltd.
- 111 464320 Ontario Ltd., o/a Daves Concrete Pumping
- 112 Dave's Crane Rental Ltd.
- 113 Davkor Concrete Pumps
- 114 Dean Construction Co. Ltd.
- 115 Deep Foundations Contractors
- 116 Dielman Industrial Installations Ltd.
- 117 Dominion Bridge Company Ltd.
- 118 Dominion Bridge AMCA International
- 119 Dominion Dewatering Ltd.
- 120 Dominion Engineering Co. Ltd.
- 121 Dominion Erectors Ltd.
- 122 Dominion Maintenance Ltd., Sarnia
- 123 Don's Crane Service Ltd.
- 124 Double D Crane Service
- 125 Dual Hoisting & Erectors Ltd.
- 126 Dulepka Equipment Rentals Ltd.
- 127 Dundas Iron & Steel Ltd.
- 128 Durwes Contracting
- 129 Dwight Crane Rentals
- 130 Electrical Crane Service Co.
- 131 Elmford Construction Co. Ltd.
- 132 Empire Crane Rentals Inc.
- 133 313187 Ontario Limited Eric and Ed Welding Contractors
- 134 Ernest Crane & Hoist Erectors
- 135 R. J. Essery Investments Co. Ltd.
- 136 Essex Machine Installation
- 137 F & W Steel Fabricators
- 138 F.A.L.C.O. Cranes
- 139 F.D.V. Construction Ltd.
- 140 Ferrigan Mechanical Contractors
- 141 Fischbach & Moore of Canada Ltd.
- 142 Formac Pumping Services Limited

- 143 Flanders Installations Ltd.
- 144 418058 Ontario Limited o/a T. J. Steel Erection
- 145 E. S. Fox Limited
- 146 Frankel Steel Limited
- 147 Franki Canada Limited
- 148 Frank's Concrete Pumping Co. Ltd.
- 149 J. M. Fuller Limited
- 150 GKN Kellar (Canada) Ltd.
- 151 Gateway Crane Rental Inc.
- 152 General Erectors & Mechanical Company Limited
- 153 General Riggers & Erectors of Canada Limited
- 154 G. M. Gest Inc.
- 155 Georges Service de Grue Inc.
- 156 Gillin Engineering & Construction Ltd.
- 157 Howe Glenn Enterprises Ltd.
- 158 Robert Globe Electrical and Mechanical Ltd.
- 159 Grand Crane Inc.
- 160 Great Lakes Steel Ltd.
- 161 Grightmire Steel Construction Ltd.
- 162 Gross Ornamental Iron Ltd.
- 163 Armand Guay Inc.
- 164 Guy's Crane Rental Ltd.
- 165 H & H Leasing
- 166 Habit Steel Construction, Div. of 379662 Ontario Ltd.
- 167 W. Hackett Crane Service Ltd.
- 168 B. W. Haggart Crane Service
- 169 Francis Hankin & Co. Limited
- 170 Har-Del Equip. Crane & Construction Rentals
- 171 Hawker Siddley Canada Ltd. Canadian Bridge Division
- 172 Hawkeye Crane Rental
- 173 Heavy Lifting Crane Service
- 174 Hercules Crane Rentals Ltd.
- 175 Hi Crane General Service Ltd.
- 176 Hodgson's Steel & Ironworks Ltd.
- 177 Hoist Equipment Rental Co.
- 178 Hoist Master Ltd.
- 179 D. E. Hopkins Investments Co. Ltd.
- 180 Horton CBI Limited
- 181 Humber Industrial Installations Ltd.
- 182 Hurdman Crane Rentals Ltd.
- 183 Industrial Formwork Limited
- 184 Industrial Lighting & Contracting Div. of Cetinski Enterprises Ltd.
- 185 Integral Erection Services Ltd.
- 186 Internorth Construction Ltd.
- 187 International Millwrighting & Rigging Inc.
- 188 Iona Erectors Ltd.
- 189 J. C. Crane (1976)
- 190 J. J. Crane Service Ltd.
- 191 J.K.J. Industrial Construction
- 192 Joe's Crane Service
- 193 Tom Jones Construction Inc.
- 194 Joy Manufacturing Company (Can) Ltd.
- 195 K.E.W. Steel Fabricators Ltd.
- 196 Kanes Krane Service o/a Tamiami Equipment Ltd.
- 197 Keay's Crane Rental Ltd.
- 198 Keith's Crane Service
- 199 Keller & Associates Mechanical Contractors Inc.
- 200 Kellestine Backhoe Service
- 201 Ken's Crane Service Ltd.
- 202 Kerr Krane Service
- 203 Kidinks Holdings Inc.

- 204 Kingston Crane Rentals Ltd.
- 205 Kingston Mechanical Ltd.
- 206 Joe Kiss Crane Rentals
- 207 Joe Kiss-Sky Scraper Crane Rentals
- 208 Klimack Construction Ltd.
- 209 Klomp Cranes Ltd.
- 210 Hugh Knight Crane Rental Ltd.
- 211 Lackie Transportation Services Ltd.
- 212 Lakeshore Crane Rental
- 213 Lakeway Rentals
- 214 Langstaff Construction
- 215 Lanor Crane Rental Inc.
- 216 LaPrairie Bros. Ltd.
- 217 G. Lavictoire & Brothers Ltd.
- 218 A. C. Leadbetter & Son Inc., Engineers Consultants & Contractors
- 219 Leeds Richardson Co.
- 220 J. A. Levasseur Construction Inc.
- 221 Len's Crane Rental Co. Ltd.
- 222 Lindsay Excavating
- 223 R. Litz & Sons Co. Ltd.
- 224 Loaring Construction Co. Ltd.
- 225 Lord & Cie Limitee
- 226 Lorlea Steels Limited
- 227 Lou's Leasing Ltd.
- 228 Lundrigans Construction Limited
- 229 Lywood Crane Service Ltd.
- 230 Mac Crane Rentals, Div. of MacLelland Construction Ltd.
- 231 MacGregor Crane Service Ltd.
- 232 Manitou Mechanical
- 233 Marshall Steel Ltd.
- 234 Martin's Crane Service Ltd.
- 235 Mastercraft Bridge and Engineering Construction (Ottawa) Limited
- 236 Matthews Group Limited
- 237 McDace Limited
- 238 McInnis Equipment Limited
- 239 Finley W. McLachlan Construction Co. Ltd.
- 240 Pat McNulty Limited
- 241 Mesley Machine Mover
- 242 Metro Hoisting & Erectors Ltd.
- 243 Mid Canada Welding Inc.
- 244 Milton Glass Construction Co. Ltd.
- 245 Milton Steel Installations Inc.
- 246 Miscellaneous Steel Installations Ltd.
- 247 Mobile Crane Rentals Limited
- 248 Modern Crane Rentals
- 249 Mohawk Pile Driving Ltd.
- 250 Moir Crane Service and Machinery Movers Ltd.
- 251 Mojan (1981) Ltee
- 252 Ralph M. Moore Industrial Installations Limited
- 253 R. R. Morin Co.
- 254 Morrison Engineering Limited
- 255 Motor City Crane Rentals
- 256 Multi-Steel Erection
- 257 Munex Limited
- 258 Myron Construction Co. Ltd.
- 259 Nadrofsky Corporation
- 260 Napanee Crane Rentals
- 261 National Construction Corp. Ltd.
- 262 Michel Neveu Excavation Ltee
- 263 Nevis Steel Construction Ltd.
- 264 New Idea Sheet Metal Co. Ltd.

265	Newmarket Crane Service
266	Niagara Structural Steel
267	G. Nicholls Construction
268	Nicholls-Radtke Ltd.
269	Noront Steel (1981) Limited
270	Norris Iron Works Limited
271	Nortek Plant Services Ltd.
272	Northern Crane & Equip. Rentals Ltd.
273	Northern Custom Steel (Muskoka) Ltd.
274	Northern Well Drilling Ltd.
275	Northway Industries of Balfour Ltd.
276	Northwestern Structural Steel Ltd.
277	Ontario Millwrights Ltd.
278	Orion Forming Ltd.
279	Ortlieb Crane & Equip. Ltd.
280	Ottawa Crane Rental Services Ltd.
281	Pachino Construction Company Ltd.
282	Pamo Inc. Entrepreneurs Generaux
283	David Parker
284	Grant Parkinson & Associates Inc.
285	Par-tex Engineering & Contracting Co. Ltd.
286	Gord Patton Cranes Ltd.
287	Paulbo Construction Limited
288	Peel Cranes (Canada) Ltd.
289	Peel Steel (Northern) Limited
290	Pemrow Pipelines Construction Co. Ltd.
291	A. G. Perron Crane Rental
292	Petrifond Foundation Co. Ltd.
293	Phoenix Steel Products Limited
294	W. C. Pietz Limited
295	Pile Foundations ('79) Ltd.
296	Pioneer Crane Service
297	Precision Erectors
298	Premco Trenching Inc.
299	Jack Preston Steel Services Ltd.
300	Pro Caissons
301	Process Mechanical Contractors Ltd.
302	Procor Limited, Crane Division
303	Procrane Inc.
304	Pumpcon Inc.
305	Pumpcrete
306	Purtell Crane Service Ltd.
307	Quebec Grues Ltee
308	Quesnelle Leasing
309	Quinte Machine & Steel Corp.
310	R & J Fabrication (Belleville) Ltd.
311	R & R Crane & Equipment Rental Inc.
312	Ram Concrete Pumping Ltd.
313	Ran-Key Maintenance Ltd.
314	Rassaun Steel & Mfg. Co. Ltd.
315	Regional Crane Rental Limited
316	Reg's Crane Service Ltd.
317	Research-Cottrell Inc.
318	Morton Revzen Co. Ltd.
319	Richard's Crane Rental Ltd.
320	Richard's Steel Ltd.
321	E. W. Richardson Investments Co. Ltd.
322	Rigging International
323	Roadbuilders Equipment Ltd.
324	H. H. Robertson Inc.
325	Rocket Hoisting Ltd.

326	Roger Concrete Pumping Co. Ltd.
327	Ronsom Industrial Maintenance Inc.
328	Ross Construction Services Ltd.
329	Roxson Contractors Ltd.
330	S & R Welding Ltd. Inc.
331	Saber Crane Rentals
332	Sarnia Cranes Ltd.
333	E & E Seegmiller Limited
334	Seeley & Sons (Crane Rentals) Ltd.
335	Selton Engineering Construction Ltd.
336	Seneca Structural Installations
337	Sentinel Reliance Products Ltd.
338	Sheafer-Townsend Limited
339	Sinclair Welding Ltd.
340	Sky-Hood Construction Inc.
341	Sky-Scraper Crane Rentals
342	C. W. Smith Crane Service Ltd.
343	520618 Ontario Limited o/a R. A. Smith & Sons Contracting
344	Murray Snider Ltd.
345	Soucie's Crane Rental
346	Southern Mechanical Contractors Ltd.
347	Southview Crane Rentals Ltd.
348	Spark Steel Erectors Limited
349	Special Foundation Systems Co.
350	Spiers Industrial Limited
351	Stanley Structures Limited
352	State Contractors Inc.
353	State Industrial Installations
354	Steel City Crane Ltd.
355	Steen Contractors Limited
356	Stel-Con Erectors Ltd.
357	D. L. Stephens Contracting Niagara Limited
358	Stone & Webster Canada Ltd.
359	Stoney Creek Mechanical Limited
360	Structures C.Q.S. Inc.
361	Sub-Terra Utility Construction Ltd.
362	Sudbury Crane Rental Ltd.
363	M. Sullivan & Son Ltd.
364	Sutherland-Schultz Limited
365	TIW A Division of Canadian Erectors Limited
366	418058 Ontario Limited o/a T. J. Steel Erection
367	Taurus Construction & Marine
368	Ten Provinces Steel Erectors Ltd.
369	392912 Ontario Limited o/a Wrightman Enterprises
370	Thunder Bay Harbor Improvements
371	Tiger City Crane Limited
372	Tower Crane Rental (York) Ltd.
373	Wm. Trafford Crane Ltd.
374	Treblex Limited
375	Trenton Crane Service (1984)
376	Trio Steel Erectors Ltd.
377	Tupelo Construction Inc.
378	H. A. Turcotte Investments Ltd.
379	293652 Ontario Ltd. Capform Ltd.
380	Urban Construction Equipment Ltd.
381	Utility Installations Ltd.
382	L & D Vallieres Ltd.
383	Venotor Crane Ltd.
384	Ward Crane Rentals Ltd.
385	David A. Ward Crane Service c/o 581545 Ontario Ltd.
386	Wayne's Crane Service

- 387 Jervis B. Webb Company of Canada Limited
- 388 Western Caissons (1969) Ltd.
- 389 Western Pile & Foundation (Ontario) Ltd.
- 390 Lee Wilson Engineering Co. Ltd.
- 391 Windsor Mechanical Contractors Ltd.
- 392 York Crane Rental Limited
- 393 York Steel
- 394 Yukon Crane Company
- 395 Ron Willett Contracting Ltd.
- 396 Zorro Excavation
- 397 Duntri Construction, a Partnership of Tipp Construction and 500879 Ontario Inc.
- 398 Con-Drain Company (1983) Ltd.
- 399 Bigelow Liptak of Canada Ltd.
- 400 Callum Mechanical
- 401 Chalmers, Doug Construction Ltd.
- 402 Chemfab Mechanical Contractors
- 403 Con-Eng Contractors Inc.
- 404 Cope Construction Co.
- 405 Corunna Fabricating Services Ltd.
- 406 Cosar Contractors Inc.
- 407 Cserni Construction (1983) Ltd.
- 408 Curran Contractors Ltd.
- 409 Da Cunha, Manuel Masonry Contractors Ltd.
- 410 Di Cocco Contractors Ltd.
- 411 Dominion Maintenance Ltd.
- 412 Edge Excavating Ltd.
- 413 Frankel Steel Ltd.
- 414 Goodfellow, S. P. Construction Ltd.
- 415 Great Lakes Fabricating
- 416 Harkness, Waters Ltd.
- 417 Hierons Construction
- 418 Imperial Insulation & Roofing (1982) Ltd.
- 419 Insta-Rek Mechanical
- 420 JKM Mechanical Contractors Limited
- 421 Jackson Construction Ltd.
- 422 Kel-Gor Ltd.
- 423 Lambton Metal Works Ltd.
- 424 Lamsar Mechanical Contractors
- 425 Maaten Construction Company Ltd.
- 426 MacKenzie Black Fabricating Co.
- 427 Mar-D Contractors
- 428 Maritime Welding Ltd.
- 429 McKay-Cocker Construction Ltd.
- 430 McKay, R. W. (1975) Construction Inc.
- 431 Moore, T. Mechanical Contractors Ltd.
- 432 Nadrofsky Steel Erecting Corp.
- 433 Plibrico Canada Ltd.
- 434 Richard's Masonry Ltd.
- 435 Rich-Mac Construction Co. Ltd.
- 436 Robbins, G. L. Construction Ltd.
- 437 Ross Contractors & Engineers
- 438 Sanderco (1976) Ltd.
- 439 Sandrin Brothers Limited
- 440 Sarnia Cranes Ltd.
- 441 Sarnia Millwright Service
- 442 Severin, Don Construction Ltd.
- 443 Sheaffer Townsend Ltd.
- 443(a) Spiers Industrial Ltd.
- 444 Steeplejack Services (Sarnia) Ltd.
- 445 D'Amore Construction (Windsor) Limited
- 446 Scofan Contractors Ltd.

447	453087 Ontario Limited O/A Mar-D Contractors
448	Area Construction Inc.
449	Kent County Contractors A Division of 504961 Ontario Ltd.
450	598452 Ontario Limited O/A W. C. Construction
451	Alnor Contracting Inc.
452	Blue-Con Construction Inc.
453	Brandon, Norm Limited
454	Bre-Ex Limited
455	Butler, Brian G. & Associates Limited
456	C & R Contractors
457	Capex Contractors - A Division of 666698 Ontario Inc.
458	Cavalon Construction (Windsor) Ltd.
459	Concord Construction, 571481 Ontario Limited
460	Dean Construction Co. Ltd.
461	Devgroup Limited
462	E. M. Bulldozing
463	Ethier, J. G. Enterprises Ltd.
464	Four Way Paving and Construction Ltd.
465	Freer Construction Ltd.
466	Hart Construction Company
467	Haynes, Gray & Associates Engineering Ltd.
468	Henry's Excavating
469	Hume Contractors Ltd.
470	Johnson, Ed Construction Ltd.
471	Johnson, Wm. Construction Limited
472	Mac Pherson Excavating & Trucking
473	Mac Pherson, Robert Excavating
474	Mc Kjen Contractors Inc.
475	Mc Lachlen, Wayne Excavating Ltd.
476	Mills, Murray Construction
477	Mills, Murray Excavating & Trucking Sarnia Ltd.
478	Monteith Group, The
479	Raaymaker Tree Service Ltd.
480	Rade, James P. Const. Ltd.
481	RBM Contractors
482	Reid Aggregates
483	Stebbins Paving & Construction Limited
484	Stephens, Bruce Excavation
485	T.C.G. Materials Limited
486	Thuss, Martin & Son Bulldozing & Excavating
487	Venhuizen, Norm Construction Ltd.
488	Wil-Mat Holdings Ltd.
489	Volley Contracting Limited
490	R. H. Woods Ltd.

The Board's notices to the following 69 employers were returned undelivered:

23	Acres Davy McKee Ltd.
24	Action Pile & Construction Co. Ltd.
27	Aktron Steel Ltd.
31	Alert Crane Service Ltd.
34	Ambler-Courtney Limited
53	Batten Erectors Limited
54	Baxter's Crane Service
55	Boom Trucks Ltd. & Bay City Crane
65	Border Cities Wire & Iron Ltd.
68	Bridge & Tank Div. of York Russe, Inc.
77	Canadian Erectors Limited
78	Canadian Longyear Limited
103	Craib Construction Ltd.
107	Cross Country Concrete Pumping Ltd.

111	464320 Ontario Ltd., o/a Daves Concrete Pumping
113	Davkor Concrete Pumps
125	Dual Hoisting & Erectors Ltd.
135	R. J. Essery Investments Co. Ltd.
143	Flanders Installations Ltd.
149	J. M. Fuller Limited
164	Guy's Crane Rental Ltd.
169	Francis Hankin & Co. Limited
170	Har-Del Equip. Crane & Construction Rentals
178	Hoist Master Ltd.
181	Humber Industrial Installations Ltd.
187	International Millwrighting & Rigging Inc.
189	J. C. Crane (1976)
216	LaPrairie Bros. Ltd.
232	Manitou Mechanical
237	McDace Limited
238	McInnis Equipment Limited
240	Pat McNulty Limited
241	Mesley Machine Mover
244	Milton Glass Construction Co. Ltd.
245	Milton Steel Installations Inc.
247	Mobile Crane Rentals Limited
252	Ralph M. Moore Industrial Installations Limited
253	R. R. Morin Co.
258	Myron Construction Co. Ltd.
277	Ontario Millwrights Ltd.
281	Pachino Construction Company Ltd.
283	David Parker
284	Grant Parkinson & Associates Inc.
290	Pemrow Pipelines Construction Co. Ltd.
293	Phoenix Steel Products Limited
298	Premco Trenching Inc.
300	Pro Caissons
301	Process Mechanical Contractors Ltd.
304	Pumpcon Inc.
316	Reg's Crane Service Ltd.
317	Research-Cottrell Inc.
323	Roadbuilders Equipment Ltd.
327	Ronsom Industrial Maintenance Inc.
329	Roxson Contractors Ltd.
335	Selton Engineering Construction Ltd.
343	520618 Ontario Limited o/a R. A. Smith & Sons Contracting
350	Spiers Industrial Limited
351	Stanley Structures Limited
359	Stoney Creek Mechanical Limited
368	Ten Provinces Steel Erectors Ltd.
388	Western Caissons (1969) Ltd.
389	Western Pile & Foundation (Ontario) Ltd.
397	Duntri Construction, a Partnership of Tipp Construction and 500879 Ontario Inc.
407	Cserni Construction (1983) Ltd.
419	Insta-Rek Mechanical
459	Concord Construction, 571481 Ontario Limited
462	E.M. Bulldozing
465	Freer Construction Ltd.
489	Volley Contracting Limited

346 employers did not respond to the Board's notice:

- 1 Armbro Materials & Construction Ltd.
- 6 Dufresne Piling Company (1967) Ltd.
- 8 W. D. LaFlamme General Contractors Ltd.

- 10 S. McNally & Sons Limited
- 11 Gordon Mulligan Construction Ltd.
- 14 Vallance & Levy Engineering Contractors
- 15 S & D Equipment Rental Ltd.
- 16 Bandiera and Associates Inc.
- 17 A-1 Fabricating & Welding Ltd.
- 19 Aavon Crane Service Limited
- 20 Acco Contracting Co.
- 21 Ace Crane Service Ltd.
- 22 Acme Crane Rentals
- 25 Adams Crane Service Ltd.
- 26 Air Crane Rental & Equip. Ltd.
- 28 Alanex Corporation Limited
- 29 William Albert Land Clearing
- 30 Aldershot Industrial Installations Ltd.
- 33 Alnor Earthmoving Limited
- 35 Amco Crane Ltd.
- 36 Amherst Crane Rentals Ltd.
- 37 Amherst Pumping Co. Ltd.
- 38 Anchor Shoring Limited
- 39 Andco Anderson Limited
- 40 Annac Construction Ltd.
- 41 412239 Ontario Ltd. c.o.b. Archer's Crane Service
- 42 Ar-Way Welding (1972) Limited
- 44 Assinch Bros. Limited
- 45 Arva Crane Ltd.
- 47 Atlas Concrete Pumping Ltd.
- 48 Aztec Contracting Limited
- 49 B & P Installations & Services Ltd.
- 50 B & W Crane Rentals
- 51 B. G. & Sons Concrete Pumping
- 52 N. Babock & Son Crane Service
- 56 Beck's Construction Management Ltd.
- 57 Bedard Girard Enterprises Div. of B.G. Checo International Ltd.
- 58 Bellai Brothers Ltd.
- 59 Belmont Crane Ltd.
- 61 Bingley Steel Works Limited
- 63 Bluebird Construction 515112 Ontario Ltd.
- 64 Bob's Crane Service
- 67 Brevandale Construction Ltd.
- 69 Brikon Masonry Inc.
- 70 Broer Crane Service
- 71 Burlington Crane Ltd.
- 72 Burlington Mechanical Installations Ltd.
- 73 Caledon Steel Erectors Ltd.
- 75 Cameron Crane & Riggers Inc.
- 79 Canadian Machinery Movers
- 81 397028 Ontario Limited Cannon Enterprises
- 82 Canron Inc. Eastern Structural Div.
- 84 370407 Ontario Ltd. o/a Cast Crane
- 85 Cem-Al Erectors Ltd.
- 86 Centennial Crane Ltd.
- 87 Central Bridge Co., Div. of TIW Industries Ltd.
- 88 Central Rigging & Contracting Ltd.
- 89 436033 Ontario Inc., o/a Chemfab Mechanical Contractors
- 90 Chricken Construction Co. Ltd.
- 92 Cleland Metal Products Ltd.
- 93 Coastal Steel Construction Ltd.
- 94 Collins Pumping Co.
- 96 Common Construction Company Ltd.
- 97 Comstock International Ltd.

98	Conaquip Limited
99	Conbrad (1970) Limited
100	Con-Drain Co. Ltd.
101	Con-Elco Ltd.
102	Cooper's Crane Rental Limited
104	Coopers Crane Rental (1982) Ltd.
105	Craneway Ltd.
106	Crescent Crane Service Div. of 3692982 Ontario Ltd.
108	Art Currie Ltd.
109	Custom Crane Service
110	Dangro Construction Service Ltd.
112	Dave's Crane Rental Ltd.
114	Dean Construction Co. Ltd.
116	Dielman Industrial Installations Ltd.
118	Dominion Bridge AMCA International
119	Dominion Dewatering Ltd.
120	Dominion Engineering Co. Ltd.
121	Dominion Erectors Ltd.
123	Don's Crane Service Ltd.
124	Double D Crane Service
127	Dundas Iron & Steel Ltd.
128	Durwes Contracting
129	Dwight Crane Rentals
130	Electrical Crane Service Co.
132	Empire Crane Rentals Inc.
133	313187 Ontario Limited Eric and Ed Welding Contractors
134	Ernest Crane & Hoist Erectors
137	F & W Steel Fabricators
138	F.A.L.C.O. Cranes
139	F.D.V. Construction Ltd.
140	Ferrigan Mechanical Contractors
141	Fischbach & Moore of Canada Ltd.
142	Formac Pumping Services Limited
144	418058 Ontario Limited o/a T. J. Steel Erection
145	E. S. Fox Limited
146	Frankel Steel Limited
148	Frank's Concrete Pumping Co. Ltd.
150	GKN Kellar (Canada) Ltd.
151	Gateway Drane Rental Inc.
154	G. M. Gest Inc.
155	Georges Service de Grue Inc.
156	Gillin Engineering & Construction Ltd.
157	Howe Glenn Enterprises Ltd.
159	Grand Crane Inc.
160	Great Lakes Steel Ltd.
161	Grightmire Steel Construction Ltd.
162	Gross Ornamental Iron Ltd.
163	Armand Guay Inc.
165	H & H Leasing
166	Habit Steel Construction, Div. of 379662 Ontario Ltd.
167	W. Hackett Crane Service
168	B. W. Haggart Crane Service
171	Hawker Siddley Canada Ltd. Canadian Bridge Division
172	Hawkeye Crane Rental
173	Heavy Lifting Crane Service
174	Hercules Crane Rentals Ltd.
175	Hi Crane General Service Ltd.
176	Hodgson's Steel & Ironworks Ltd.
179	D. E. Hopkins Investments Co. Ltd.
180	Horton CBI Limited
183	Industrial Formwork Limited

- 184 Industrial Lighting & Contracting Div. of Cetinski Enterprises Ltd.
- 185 Integral Erection Services Ltd.
- 186 Internorth Construction Ltd.
- 188 Iona Erectors Ltd.
- 190 J. J. Crne Service Ltd.
- 191 J.K.J. Industrial Construction
- 192 Joe's Crane Service
- 194 Joy Manufacturing Company (Can) Ltd.
- 196 Kanes Krane Service o/a Tamiami Equipment Ltd.
- 197 Keay's Crane Rental Ltd.
- 198 Keith's Crane Service
- 199 Keller & Associates Mechanical Contractors Inc.
- 200 Kellestine Backhoe Service
- 201 Ken's Crane Service Ltd.
- 202 Kerr Krane Service
- 203 Kidinks Holdings Inc.
- 204 Kingston Crane Rentals Ltd.
- 205 Kingston Mechanical Ltd.
- 206 Joe Kiss Crane Rentals
- 208 Klimack Constuction Ltd.
- 209 Klomp Cranes Ld.
- 210 Hugh Knight Crane Rental Ltd.
- 212 Lakeshore Crane Rental
- 213 Lakeway Rentals
- 214 Langstaff Construction
- 215 Lanor Crane Rental Inc.
- 218 A. C. Leadbetter & Son Inc., Engineers Consultants & Contractors
- 220 J. A. Levasseur Construction Inc.
- 221 Len's Crane Rental Co. Ltd.
- 222 Lindsay Excavating
- 224 Loaring Constuction Co. Ltd.
- 225 Lord & Cie Limitee
- 227 Lou's Leasing Ltd.
- 229 Lywood Crane Service Ltd.
- 230 Mac Crane Rentals, Div. of MacLelland Construction Ltd.
- 231 MacGregor Crane Service Ltd.
- 233 Marshall Steel Ltd.
- 234 Martin's Crane Service Ltd.
- 236 Mathews Group Limited
- 239 Finley W. McLachlan Construction Co. Ltd.
- 242 Metro Hoisting & Erectors Ltd.
- 246 Miscellaneous Steel Installations Ltd.
- 248 Modern Crane Rentals
- 249 Mohawk Pile Driving Ltd.
- 255 Motor City Crane Rentals
- 256 Milti-Steel Erection
- 260 Napanee Crane Rentals
- 261 National Construction Corp. Ltd.
- 262 Michel Neveu Excavation Ltee
- 263 Nevis Steel Construction Ltd.
- 264 New Idea Sheet Metal Co. Ltd.
- 265 Newmarket Crane Service
- 266 Niagara Structural Steel
- 267 G. Nicholls Construction
- 270 Norris Iron Works Limited
- 271 Nortek Plant Services Ltd.
- 272 Northern Crane & Equip. Rentals Ltd.
- 273 Northern Custom Steel (Muskoka) Ltd.
- 274 Northern Well Drilling Ltd.
- 276 Northwestern Structural Steel Ltd.
- 280 Ottawa Crane Rental Services Ltd.

282	Pamo Inc. Entrepreneurs Generauz
285	Par-tex Engineering & Contracting Co. Ltd.
286	Gord Patton Cranes Ltd.
288	Peel Cranes (Canada) Ltd.
289	Peel Steel (Northern) Limited
291	A. G. Perron Crane Rental
292	Petrifond Foundation Co. Ltd.
294	W. C. Pietz Limited
296	Pioneer Crane Service
297	Precision Erectors
302	Procor Limited, Crane Division
303	Procrane Inc.
305	Pumpcrete
306	Purtell Crane Service Ltd.
307	Quebec Grues Ltee
308	Quesnelle Leasing
310	R & J Fabrication (Belleville) Ltd.
311	R & R Crane & Equipment Rental Inc.
312	Ram Concrete Pumping Ltd.
313	Ran-Key Maintenance Ltd.
314	Rassaun Steel & Mfg. Co. Ltd.
315	Regional Crane Rental Limited
318	Morton Revzen Co. Ltd.
319	Richard's Crane Rental Ltd.
320	Richard's Steel Ltd.
321	E. W. Richardson Investments Co. Ltd.
322	Rigging International
325	Rocket Hoisting Ltd.
326	Roger Concrete Pumping Co. Ltd.
328	Ross Construction Services Ltd.
330	S & R Welding Ltd. Inc.
331	Saber Crane Rentals
332	Sarnia Cranes Ltd.
334	Seeley & Sons (Crane Rentals) Ltd.
336	Seneca Structural Installations
340	Sky-Hood Construction Inc.
341	Sky-Scraper Crane Rentals
342	C. W. Smith Crane Service Ltd.
344	Murray Snider Ltd.
345	Soucie's Crane Rental
346	Southern Mechanical Contractors Ltd.
347	Southview Crane Rentals Ltd.
349	Special Foundation Systems Co.
352	State Contractors Inc.
353	State Industrial Installations
354	Steel City Crane Ltd.
355	Steen Contractors Limited
356	Stel-Con Erectors Ltd.
360	Structures C.Q.S. Inc.
361	Sub-Terra Utility Construction Ltd.
362	Sudbury Crane Rental Ltd.
363	M. Sullivan & Son Ltd.
365	TIW A Division of Canadian Erectors Limited
366	418058 Ontario Limited o/a T. J. Steel Erection
367	Taurus Construction & Marine
369	392912 Ontario Limited o/a Wrightman Enterprises
370	Thunder Bay Harbor Improvements
371	Tiger City Crane Limited
372	Tower Crane Rental (York) Ltd.
373	Wm. Trafford Crane Ltd.
374	Treblex Limited

- 376 Trio Steel Erectors Ltd.
- 377 Tupelo Construction Inc.
- 378 H. A. Turcotte Investments Ltd.
- 379 293652 Ontario Ltd. Capform Ltd.
- 380 Urban Construction Equipment Ltd.
- 381 Utility Installations Ltd.
- 382 L. & D Vallieres Ltd.
- 384 Ward Crane Rentals Ltd.
- 385 David A. Ward Crane Service c/o 581545 Ontario Ltd.
- 386 Wayne's Crane Service
- 390 Lee Wilson Engineering Co. Ltd.
- 391 Windsor Mechanical Contractors Ltd.
- 392 York Crane Rental Limited
- 393 York Steel
- 394 Yukon Crane Company
- 395 Ron Willett Contracting Ltd.
- 396 Zorro Excavation
- 398 Con-Drain Company (1983) Ltd.
- 399 Bigelow Liptak of Canada Ltd.
- 400 Callum Mechanical
- 401 Chalmers, Doug Construction Ltd.
- 402 Chemfab Mechanical Contractors
- 404 Cope Construction Co.
- 405 Corunna Fabricating Services Ltd.
- 406 Cosar Contractors Inc.
- 408 Curran Contractors Ltd.
- 409 Da Cunha, Manuel Masonry Contractors Ltd.
- 410 Di Cocco Contractors Ltd.
- 411 Dominion Maintenance Ltd.
- 412 Edge Excavating Ltd.
- 413 Frankel Steel Ltd.
- 414 Goodfellow, S. P. Construction Ltd.
- 415 Great Lakes Fabricating
- 416 Harkness, Waters Ltd.
- 417 Hierons Construction
- 418 Imperial Insulation & Roofing (1982) Ltd.
- 420 JKM Mechanical Contractors Limited
- 421 Jackson Construction Ltd.
- 422 Kel-Gor Ltd.
- 423 Lambton Metal Works Ltd.
- 424 Lamsar Mechanical Contractors
- 425 Maaten Construction Company Ltd.
- 426 MacKenzie Black Fabricating Co.
- 427 Mar-D Contractors
- 428 Maritime Welding Ltd.
- 429 McKay-Cocker Construction Ltd.
- 430 McKay, R. W. (1975) Construction Inc.
- 431 Moore, T. Mechanical Contractors Ltd.
- 432 Nadrofsky Steel Erecting Corp.
- 433 Plibrico Canada Ltd.
- 434 Richard's Masonry Ltd.
- 435 Rich-Mac Construction Co. Ltd.
- 436 Robbins, G. L. Construction Ltd.
- 437 Ross Contractors & Engineers
- 438 Sanderco (1976) Ltd.
- 439 Sandrin Brothers Limited
- 440 Sarnia Cranes Ltd.
- 441 Sarnia Millwright Service
- 442 Severin, Don Construction Ltd.
- 443 Sheafer Townsend Ltd.
- 443(a) Spiers Industrial Ltd.

444 Steeplejack Services (Sarnia) Ltd.
 445 D'Amore Construction (Windsor) Limited
 447 453087 Ontario Limited D/A Mar-D Contractors
 448 Area Construction Inc.
 449 Kent County Contractors A Division of 504961 Ontario Ltd.
 450 598452 Ontario Limited D/A W. C. Construction
 451 Alnor Contracting Inc.
 452 Blue-Con Construction Inc.
 453 Brandon, Norm Limited
 454 Bre-Ex Limited
 455 Butler, Brian G. & Associates Limited
 456 C & R Contractors
 457 Capex Contractors - A Division of 666698 Ontario Inc.
 458 Cavalon Construction (Windsor) Ltd.
 461 Devgroup Limited
 463 Ethier, J. G. Enterprises Ltd.
 464 Four Way Paving and Construction Ltd.
 466 Hart Construction Company
 468 Henry's Excavating
 469 Hume Contractors Ltd.
 470 Johnson, Ed Construction Ltd.
 471 Johnson, WM. Construction Limited
 472 Mac Pherson Excavating & Trucking
 473 Mac Pherson, Robert Excavating
 474 Mc Kjen Contractors Inc.
 475 Mc Lachlen, Wayne Excavating Ltd.
 476 Mills, Murray Construction
 477 Mills, Murray Excavating & Trucking Sarnia Ltd.
 478 Monteith Group, The
 479 Raaymaker Tree Service Ltd.
 480 Rade, James P. Const. Ltd.
 481 RBM Contractors
 483 Stebbins Paving & Construction Limited
 484 Stephens, Bruce Excavation
 485 T.C.G. Materials Limited
 486 Thuss, Martin & Son Bulldozing & Excavating
 487 Venhuizen, Norm Construction Ltd.
 488 Wil-Mat Holdings Ltd.

61 employers made employer filings in Form 94:

2 Beaver Asphalt (Ontario) Limited
 3 Beaver Asphalt Paving Company Limited
 4 Beaver Construction Group Limited, Beaver Construction Ontario Division
 4(a) Beaver Pipeline Construction
 5 Dibblee Construction Limited
 7 Fix-Fast Ltd.
 9 H. J. McFarland Construction Co. Ltd.
 12 O'Leary's Limited
 13 Taggart Construction Limited
 18 A.M.I. Steego A Division of McKerlie-Millen Inc.
 32 Allied Conveyors Limited
 43 Arlington Crane Service Ltd.
 60 Birmingham Construction Limited
 62 Blenkhorn & Sawle Limited
 66 Bot Construction (Canada) Ltd.
 74 Calorific Construction Limited
 76 Canadian Dredge & Dock Inc.
 80 Canal Contractors (Division of Canadian Shipbuilding & Engineering Ltd.)
 83 Carr Steel Const. Ltd.
 91 Adam Clark Company Ltd.

95	Commercial Contracting Corporation of Canada, Limited
115	Deep Foundations Contractors
117	Dominion Bridge Company Ltd.
122	Dominion Maintenance Ltd., Sarnia
147	Franki Canada Limited
152	General Erectors & Mechanical Company Limited
153	General Riggers & Erectors of Canada Limited
158	Robert Globe Electrical and Mechanical Ltd.
182	Hurdman Crane Rentals Ltd.
193	Tom Jones Construction Inc.
195	K.E.W. Steel Fabricators Ltd.
207	Joe Kiss-Sky Scraper Crane Rentals
211	Lackie Transportation Services Ltd.
219	Leeds Richardson Co.
226	Lorlea Steels Limited
228	Lundrigans Construction Limited
235	Mastercraft Bridge and Engineering Construction (Ottawa) Limited
243	Mid Canada Welding Inc.
250	Moir Crane Service and Machinery Movers Ltd.
251	Mojan (1981) Ltee
268	Nicholls-Radtke Ltd.
278	Orion Forming Ltd.
279	Ortlieb Crane & Equip. Ltd.
287	Paulbo Construction Limited
295	Pile Foundations ('79) Ltd.
299	Jack Preston Steel Services Ltd.
309	Quinte Machine & Steel Corp.
324	H.H. Robertson Inc.
333	E & E Seegmiller Limited
338	Sheafer-Townsend Limited
339	Sinclair Welding Ltd.
348	Spark Steel Erectors Limited
357	D.L. Stephens Contracting Niagara Limited
358	Stone & Webster Canada Ltd.
375	Trenton Crane Service (1984)
383	Veneto Crane Ltd.
387	Jervis B. Webb Company of Canada Limited
403	Con-Eng Contractors Inc.
460	Dean Construction Co. Ltd.
482	Reid Aggregates
490	R. H. Woods Ltd.

16 employers replied by letter:

46	Astro Crane Services Limited
126	Dulepka Equipment Rentals Ltd.
131	Elmford Construction Co. Ltd.
136	Essex Machine Installation
177	Hoist Equipment Rental Co.
217	G. Lavictoire & Brothers Ltd.
223	R. Litz & Sons Co. Ltd.
254	Morrison Engineering Limited
257	Munex Limited
259	Nadrofsky Corporation
269	Noront Steel (1981) Limited
275	Northway Industries of Balfour Ltd.
337	Sentinel Reliance Products Ltd.
364	Sutherland-Schultz Limited
446	Scofan Contractors Ltd.
467	Haynes, Gray & Associates Engineering Ltd.

42 employers disputed the Engineers union's claim to bargaining rights for their operating engineers employed in the relevant sectors and Board area:

Form 94 Reply

32	Allied Conveyors Limited
66	Bot Construction (Canada) Ltd.
74	Calorific Construction Limited
76	Canadian Dredge & Dock Inc.
80	Canal Contractors (Division of Canadian Shipbuilding & Engineering Ltd.)
83	Carr Steel Const. Ltd.
91	Adam Clark Company Ltd.
117	Dominion Bridge Company Ltd.
122	Dominion Maintenance Ltd., Sarnia
147	Franki Canada Limited
152	General Erectors & Mechanical Company Limited
153	General Riggers & Erectors of Canada Limited
158	Robert Globe Electrical and Mechanical Ltd.
182	Hurdman Crane Rentals Ltd.
193	Tom Jones Construction Inc.
195	K.E.W. Steel Fabricators Ltd.
211	Lackie Transportation Services Ltd.
219	Leeds Richardson Co.
226	Lorlea Steels Limited
228	Lundrigans Construction Limited
235	Mastercraft Bridge and Engineering Construction (Ottawa) Limited
268	Nicholls-Radtke Ltd.
278	Orion Forming Ltd.
279	Ortlieb Crane & Equip. Ltd.
299	Jack Preston Steel Services Ltd.
309	Quinte Machine & Steel Corp.
324	H.H. Robertson Inc.
333	E & E Seegmiller Limited
338	Sheafer-Townsend Limited
357	D.L. Stephens Contracting Niagara Limited
375	Trenton Crane Service (1984)
383	Venetor Crane Ltd.
387	Jervis B. Webb Company of Canada Limited
403	Con-Eng Contractors Inc.
460	Dean Construction Co. Ltd.

Letter Reply

254	Morrison Engineering Limited
257	Munex Limited
259	Nadrofsky Corporation
269	Noront Steel (1981) Limited
275	Northway Industries of Balfour Ltd.
364	Sutherland-Schultz Limited
467	Haynes, Gray & Associates Engineering Ltd.

8. The Teamsters union has claimed bargaining rights pursuant to the Agreement for the employees of, and the Board sent notices in Form 93 to nine employers as follows:

2	Beaver Asphalt (Ontario) Limited
3	Beaver Asphalt Paving Company Limited
4	Beaver Construction Group Limited, Beaver Construction Ontario Division
5	Dibblee Construction Limited
6	Dufresne Piling Company (1967) Ltd.
9	H. J. McFarland Construction Co. Ltd.

- 10 S. McNally & Sons Limited
- 12 O'Leary's Limited
- 14 Vallance & Levy Engineering Contractors

Three employers did not respond to the Board's notice:

- 6 Dufresne Piling Company (1967) Ltd.
- 10 S. McNally & Sons Limited
- 14 Vallance & Levy Engineering Contractors

Six employers made employer filings in Form 94:

- 2 Beaver Asphalt (Ontario) Limited
- 3 Beaver Asphalt Paving Company Limited
- 4 Beaver Construction Group Limited, Beaver Construction Ontario Division
- 5 Dibblee Construction Limited
- 9 H. J. McFarland Construction Co. Ltd.
- 12 O'Leary's Limited

9. When these issues came before the Board for hearing, the employers and other parties who were present or represented at the hearing arrived at an agreement that the Board set aside the bargaining rights issue until it decides the issue of Final Schedule "F". They also agreed that, should the Board decide not to compile a Final Schedule "F" and in the event of a claim in a future proceeding before the Board by the Engineers union that it held bargaining rights in the relevant sectors and geographic area under one of the aforesaid collective agreements, the Engineers union would have to fulfill specific notice obligations and waive any claim to damages in the first claim against each employer. The text of their agreement on the notice and damage waiver requirements reads as follows:

The Respondents, International Union of Operating Engineers, Local 793, Labourers International Union of North America, Local 527, International Brotherhood of Teamsters, Local 91 hereby agree that should an Accreditation Order issue and should there be a finding by the Ontario Labour Relations Board that a final Schedule "F" is not to be compiled in the Applications for Accreditation by the National Capital Road Builders Association, then in any situation in which the Respondents or any of them are asserting that an Employer is bound by the Accreditation Order, notice must and shall be given to the Association(s) and the Employer being party to the Collective Agreement under which the Respondents or any of them are alleging bargaining rights.

In addition, only in any cases of first instance involving the issue of the existence of bargaining rights forming the basis for the application of the Accreditation Order, relative to each Association(s) and/or the Employer Collective Agreement, no liability in the form of damages shall be claimed or found provided that essentially the same issues have not been argued and decided before the Ontario Labour Relations Board between the Respondent trade unions on the one hand and either of the Employer Association or the Employer on the other.

10. The Board proceeded in the hearing in accordance with their agreement and received their submissions on the Final Schedule "F" issue. Those submissions are set out below:

Submissions for the Respondent

(1) The Act is drafted to bind employers for whose employees a respondent trade union holds bargaining rights, as at the date of making of an application for accreditation, in the sector or sectors and geographic area found by the Board to be appropriate, or employers for whose employees the trade union acquires such bargaining rights after the application date and after the accreditation certificate has issued.

(2) Since the Final Schedule “F” is prepared to reflect the bargaining rights held as at the date of application, no matter when the schedule is compiled, it is incomplete at the time of issue as to the contractors who would be bound by the order because it would not contain the names of any contractors for whose employees the respondent trade union acquired bargaining rights after the date of application and before the date when the accreditation certificate issues.

(3) The problem which the Final Schedule “F” represents for a trade union respondent to an application for accreditation arises out of the Board’s determinations in its *Valentine Enterprises Contracting* and *John Hayman & Sons Limited* decisions. Those decisions read together stand for the proposition that a trade union cannot rely on bargaining rights obtained prior to the application date in a proceeding after the application date unless the employer’s name is listed on the Final Schedule “F”. That circumstance requires a trade union, when replying to an application for accreditation, to assert all possible bargaining rights or be considered to have abandoned them. The bargaining rights claims of the trade union must be resolved before the Final Schedule “F” can be compiled and the accreditation certificate and order issued. All of which leads to delays in disposing of the application and proceedings which are time consuming and costly to the parties and wasteful of the Board’s time and resources.

(4) Nothing in the Act or the Board’s Rules of Procedure requires that a Final Schedule “F” be compiled. It is used by the Board as an administrative aid for separating those employers who affect the determinations under section 127 of the Act from those who do not, but who would be bound by an accreditation certificate and order. The schedule has nothing to do with whether a certificate and order should issue. That being the case, the question of which employers, other than those who affect the count under section 127, who would be bound by the certificate and order, should be left for a decision whenever the question arises in a particular case. That was the principle expressed by the Board in the context of an application for certification in *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159, at paragraphs 11 and 12, in a situation analogous to delaying the issuing of an accreditation certificate until the Final Schedule “F” is compiled:

11. *We are satisfied that where, as here, the description of the appropriate bargaining unit has been settled and the Board can say with certainty that more than 55 per cent of the employees in that unit on the application date were members of the applicant at the relevant time, the Board does have the jurisdiction to grant the applicant a final certificate, notwithstanding the existence of questions which could be dealt with in an application under subsection 106(2).* Although the parties to this application agreed to attempt settlement of those questions before asking the Board to answer them, their agreement played no part in our conclusion on the jurisdictional question. The Board would have jurisdiction to grant a final certificate in these circumstances even if there were no such agreement.

12. *There was no suggestion in this case that the bargaining unit description would be affected by a determination of the employee status of the disputed individuals.* We need not deal here with the question whether and to what extent the Board must or ought to continue to resolve questions of the application of subsection 1(3)(b) in the fine tuning of a bargaining-unit description when those questions do not otherwise affect the result.

[emphasis added]

Since the Final Schedule “F” has nothing to do with whether an applicant should be accredited, it may be academic until a specific issue arises respecting whether a particular employer is bound to the accreditation certificate and order because, at the time the application was made, the respondent trade union held bargaining rights for the employees of that employer. The Board should be reticent to deal with what may be an academic issue in matters involving the acquisition or termination of bargaining rights which should be dealt with expeditiously. The Board should deal with real and focused issues.

(5) If the Board continues to compile a Final Schedule “F” in each application for accreditation, the very length of those proceedings may prove so burdensome on applicants that they will not proceed with their applications even though they are in a position to be accredited. That devel-

opment would have the effect of writing the accreditation provisions out of the Act and would deprive employers of a means of balancing their bargaining power with that of trade unions.

(6) The interests of parties and employers potentially affected by an application for accreditation can be protected in two ways. First, the notice to employers of an application for accreditation could be used as a means of drawing their attention specifically to the bargaining rights issue and of stating that, in the absence of a reply which expressly addressed the issue and/or in the absence of any reply at all, the Board may determine to proceed with the application and not decide the bargaining rights issue affecting the employer. That would leave the issue to arise in the course of subsequent litigation between the parties and be decided then. Second, the accreditation certificate and order could express that it will be binding on all employers for whom the respondent trade union holds bargaining rights as of the date of application and for such other employers for whose employees the trade union may obtain bargaining rights thereafter by certification or voluntary recognition.

(7) Since a Final Schedule "F" is not required by the Act or the Board's Rules of Procedure, the decision of whether the Board should continue to compile a schedule is a procedural one and falls squarely within the Board's discretion under subsection 102(13) of the Act.

Submissions for the Applicant

Applicant counsel endorsed and adopted the submissions of counsel for the respondent and added that the extensive proceedings which would be required to resolve a Final Schedule "F" for each of its applications would make the proceedings too costly for the applicant to continue with the applications and that would defeat the purposes of the accreditation provisions of the Act.

Submissions of the Other Parties

Mr. Liberman, on behalf of interveners #2 and #3 and his employer clients, neither supports nor contests the position taken by counsel for the respondents, but, if the Board decides not to compile a Final Schedule "F" in these applications, he contends that the Board must include in its decision the agreement reached by the parties for their protection against damages in the first instance that an employer is unsuccessful in contesting a claim that the respondent holds bargaining rights for employees of the employer in the relevant sectors and geographic area. The submissions of the other parties which supported the position taken by counsel for the respondents, also included the following:

(1) When the Minister first issued employer designations respecting province-wide bargaining, there was a purposeful decision at the time the designation order issued not to attempt to compile an exhaustive list of the employers covered by each order at the time of issue because of the immensely difficult administrative task of compiling the list. In the instant case, the Board would be dealing with five collective agreements involving multiple parties and individual employers. Therefore, it would be an extremely difficult and time consuming task to determine whether those agreements establish the bargaining rights asserted by the respondent trade unions.

(2) There is reasonable ground for apprehension that good collective bargaining relationships could be jeopardized by forcing parties who are bound to one of the asserted collective agreements to litigate what amounts to an academic or theoretical issue of whether the collective agreement establishes bargaining rights in a sector or sectors where the employer has not had employees in those sectors in the past and is not likely to have them in the future.

11. The sections of the Act relevant to the issue are:

125. Where a trade union or council of trade unions has been certified or has been granted voluntary recognition under section 16 as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geo-

graphic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.

126.-(1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.

(2) The unit of employers shall comprise all employers as defined in clause 117(c) in the geographic area and sector determined by the Board to be appropriate.

127.-(1) Upon an application for accreditation, the Board shall ascertain,

- (a) the number of employers in the unit of employers on the date of the making of the application who have within one year prior to such date had employees in their employ for whom the trade union or council of trade unions has bargaining rights in the geographic area and sector determined by the Board to be appropriate;
- (b) the number of employers in clause (a) represented by the employers' organization on the date of the making of the application; and
- (c) the number of employees of employers in clause (a) on the payroll of each such employer for the weekly payroll period immediately preceding the date of the application or if, in the opinion of the Board, such payroll period is unsatisfactory for any one or more of the employers in clause (a), such other weekly payroll period for any one or more of the said employers as the Board considers advisable.

(2) If the Board is satisfied,

- (a) that a majority of the employers in clause (1)(a) is represented by the employers' organization; and
- (b) that such majority of employers employed a majority of the employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization as the bargaining agent of the employers in the unit of employers and for such other employers for whose employees the trade union or council of trade unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area and sector.

(3) Before accrediting an employers' organization under subsection (2), the Board shall satisfy itself that the employers' organization is a properly constituted organization and that each of the employers whom it represents has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent.

12. The Board's reasons and conclusions set out in paragraphs 8 through 11, 13 through 25 and paragraph 27 of its decision dated October 6, 1988 in File No. 2153-87-R are equally applicable to the issue in this file. Therefore, the Board adopts those reasons and conclusions as though recited herein and modified where necessary, particularly to refer to the two respondent trade unions herein instead of the Labourers International Union of North America, Local 527. In the result, since the Board is satisfied that to adjudicate the bargaining rights claims of the Engineers union and the Teamsters union would not alter the fact that the double majority test established by clauses (a) and (b) of subsection 127(2) of the Act has been met for each unit of employers, having regard to the agreement of the parties described at paragraph 9 of this decision and in all the circumstances of this case, the Board will not compile a Final Schedule "F" for either application for accreditation in the instant file.

13. The Board turns now to the matter of the certificates of accreditation which should issue to the applicant with respect to the units of employers described at paragraph 2 above. When the parties made the agreement described at paragraph 9 of the instant decision, they also agreed to request the Board to apply a clarity note to the unit described in terms of the Engineers union. Therefore, having regard to the agreement of the parties, and for the purposes of clarity, the Board declares that employers bound by the following speciality collective agreements operative in or affecting the roads, sewers and watermains, and heavy engineering sectors of the construction industry, amongst other sectors, binding between:

- (1) Ottawa Crane Rental Association and Crane Rental Association of Ontario and the International Union of Operating Engineers, Local 793;
- (2) Ontario Association of Foundation Specialists and the International Union of Operating Engineers, Local 793; and
- (3) Ontario Erectors Association and the International Union of Operating Engineers, Local 793

are not included in the bargaining unit of employers of operating engineers.

14. Having regard to all of the foregoing and to the findings in the decisions in these matters dated November 13, 1987 and January 29, 1988, certificates of accreditation will issue to the National Capital Road Builders Association for:

- (1) all employers of employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same for whom the International Union of Operating Engineers, Local 793 has bargaining rights as at November 7, 1986, in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and, in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers for whose employees the International Union of Operating Engineers, Local 793 may after November 7, 1986, obtain bargaining rights through certification or voluntary recognition in the sectors and geographic area just described; and
 - (2) all employers of truck drivers for whom the International Brotherhood of Teamsters Union, Local 91 has bargaining rights as at November 7, 1986, in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and, in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers for whose employees the International Brotherhood of Teamsters Union, Local 91 may after November 7, 1986, obtain bargaining rights through certification or voluntary recognition in the sectors and geographic area just described.
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1549-88-R Glass, Molders, Pottery, Plastics & Allied Workers International Union (AFL-CIO, CLC), Applicant v. Northfield Metal Products Ltd., Respondent v. Group of Employees, Objectors

Certification - Representation Vote - Complaint that a large number of employees did not understand the Notice of Taking of Vote because of language difficulties dismissed - Fact that sample ballot defaced prior to vote not leading Board to direct new vote - Electioneering by union in the form of statements and objects marked with the union logo not coercive - None of the allegations were raised until after the vote had been counted - No reason to direct new vote - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

DECISION OF THE BOARD; January 31, 1989

1. This is the continuation of an application for certification. By the Board's decision of October 26, 1988, a representation vote was ordered which was held on Wednesday, November 16, 1988 at the employer's place of employment. The decision below deals with certain objections to the conduct of that vote.

2. Scrutineers for each of the applicant, respondent and objecting employees signed a "Certification of Conduct of Election" that states in part:

We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

As well, the same people signed a "Consent and Waiver" form which contains the following paragraphs as well as setting out the parties' agreement on what ballots should be segregated and not counted:

We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 16th day of November, 1988.

... [agreement on segregation of ballots omitted]

And we hereby waive any objections as to the regularity and sufficiency of the balloting.

The vote was accordingly counted. A majority of employees voted in favour of the applicant. The number of segregated ballots was smaller than the margin of victory. On November 22 and 24, 1988, respectively, the Board received statements of desire from a group of employees and from the respondent employer. Both statements made objections to certain matters relating to the conduct of the vote, all of which took place prior to the actual polling. The matter of these representations was set down for hearing.

3. At the outset of the hearing the union made a motion to dispose of the matter without hearing further evidence on the basis that the relief sought, the overturning of the vote and the granting of a new representation vote, should not be granted on the facts set out in the statement of desire. The Board heard submissions from all parties on that motion, and recessed to consider the matter on the basis that all of the facts pleaded by the respondent and objecting employees were true, without so finding. We granted the motion in an oral decision on the day of hearing as follows:

The Board is of the unanimous view that no evidence need be heard as the

allegations, on the assumption they are true, would not lead us to grant a new vote. The test as applied by the Board is whether or not the actions complained of are coercive or destroy the secrecy of the ballot. The test is not based on the most gullible or the most firm voter, but the reasonable voter who is possessed of critical faculties and the ability to assess issues and inquire on his or her own behalf. A different standard for people of different ethnic backgrounds has not been applied by the Board in the past and we do not propose to do so in this case.

We will briefly indicate our reasons on each of the allegations and a written decision will follow.

We then went through each of the allegations in the statements of desire and gave our reasons for not considering them sufficient to order a new vote. We set those reasons out in a slightly expanded fashion herein.

4. The objecting employees complained firstly that a large number of employees in the bargaining unit did not understand the Notice of Taking of Vote posted before the vote or the ballot, due to language difficulties and multiple dialects. Illiteracy of many of the ethnic employees and the presence of people of ten different Laotian dialects in the bargaining unit were particularized. The respondent employer made the same allegation worded slightly differently. (The question of the respondent's right to raise matters on behalf of employees was not raised, but see, most recently, *Image Painters*, [1988] OLRB Rep. Aug. 807, *Javid Construction*, [1988] OLRB Rep. Sept. 906).

5. The Board has consistently refused to apply a different standard for employees of different ethnic backgrounds in evaluating evidence related to membership evidence and participation in Board processes. See for instance, *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 688, *S.K.D. Manufacturing Company Ltd.*, [1969] OLRB Rep. Feb. 1185, *Dylex Limited*, [1977] OLRB Rep. June 357, *Bravo Cement Contrating Ltd.*, [1980] OLRB Rep. Oct. 1354, *Image Painters*, *supra* and *Javid Construction*, *supra*. As well, the Board has held that it is under no responsibility for the ability of employees to read English or their literacy. See *IlSCO*, [1973] OLRB Rep. May 221. Nonetheless, it was common ground that in this case the notices of the vote had been translated into three different Asian languages. We agree with the Board's previous decisions and find the allegations relating to language ability and ethnicity insufficient to warrant a new vote.

6. The objecting employees and the respondent both complained that the Board's Notices of Taking of Vote were defaced in advance of the vote by an "X" indicating that employees must vote in favour of the union and that these were later found in the possession of one of the bargaining unit employees who had been active in organizing the union. It was admitted in argument that there was no evidence that the defacing had been done by this person or representatives of the union. Furthermore, we are of the view that the defacing of the notice in this manner was not coercive, although it is a breach of the Registrar's direction not to remove or deface Board notices. We agree with the conclusions of the Board in *Stauffer-Dobbie Manufacturing Company*, 59 CLLC ¶ 18,147. The facts of that case included a similar allegation - that the union had published a marked sample ballot. The Board said:

The advertisement is obvious propaganda clearly recognizable as such by the employees concerned and in our opinion not likely to have misled them in any way. If the respondent had affixed to the ballot the name of one of the other parties to the proceedings, the situation might well be otherwise. However, in the circumstances of this case, the publication of the ballot cannot be said to have improperly influenced the vote and in the absence of improper influence, the infringement of section 56 [which required the name of the publisher and printer] of the Act

standing by itself does not invalidate the vote and relief therefor should be sought in other proceedings.

7. The next allegation is that Laotian employees were told by union members in response to questions as to how they should vote, to mark the ballot in favour of the union without being advised of their right to free choice. This allegation cannot have the result of ordering a new vote for the reasons set out above in regards to employees of various ethnic origins. In any event electioneering is permitted. The Board is not in the business of policing electioneering unless the conduct is coercive or jeopardizes the secrecy of the ballot. Rather, as the Board said in *Stauffer Dobbie, supra*:

A new vote will generally be directed where the action complained of is coercive in nature or if ways and means of destroying the secrecy of the ballot or the confidence of the employees in the secrecy of the ballot are suggested or implied.... In the main, however, a considerable amount of leeway is permitted in electioneering. The Board does not undertake to police election campaigns or to consider the truth or falsity of campaign literature and speeches unless the ability of the employees to evaluate such literature or speeches is impaired, e.g., by the use of campaign trickery to such an extent that the free desires of the employees cannot be determined in a secret vote.... In determining the impact on the voters of the literature complained of, it is of course obvious that it is really, and perhaps never, possible to determine objectively what effect it has actually had. One cannot pay too much attention to either the most gullible voter or to the one of firm convictions. One can only look at the circumstances of each case and, on the facts presented, determine whether the statements objected to are of such a nature that they are likely to have seriously misled a "reasonable" voter.

See also *Cara Operations Ltd.*, [1985] OLRB Rep. Feb. 222, *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19, and *Carlton Cards Ltd.*, [1985] OLRB Rep. Sept. 1352.

8. The next allegation is that employees were given hats and other objects marked with the union logo to wear at work and subsequently told that if the union was unsuccessful, management would know they supported the union, and their jobs would be jeopardized. We find this to be an allegation of further electioneering which would be able to be evaluated by a reasonable employee. We are not prepared to draw the inference that a reasonable employee could not express a free choice in a secret ballot because of such an event. We view the employer's allegations that "Vote Yes!" stickers were placed on plant machinery, notices of a "Local Union Meeting" were distributed by union representatives to the employees of the company at its gate on November 16, 1988 and that union representatives told employees that if they voted for the union they would immediately receive benefits ranging from a 40-hour work week to free work boots in the same light.

9. The employer also made comments about the number of ballots that were segregated at the vote, but none of them disclosed any allegation of coercion or jeopardy of the secrecy of the ballot and are irrelevant to the motion before us.

10. We have also considered an allegation made by the employer in argument that was not pleaded, i.e. that the quality control officer who was agreed to be in the bargaining unit would have been seen to be an authority figure when he made remarks in favour of the union at the plant. When the bargaining unit was agreed upon management did not challenge the inclusion of this position. We cannot on any objective test find the fact of a bargaining unit employee's expressing his views coercive. This also appears to be part of the argument that employees of some ethnic origins are less able to evaluate information than others, with which we have dealt above. This allegation does not lead us to order a new vote.

11. Additionally, none of the allegations were raised until such time as the employer and

the objecting employees were aware of the vote results. We agree with the approach taken in *Chateau Gardens*, [1977] Jan. OLRB Rep. 12 where the Board said that a party cannot "lie in the bushes" and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of taking the vote. The objecting employees state that they did not know of the improprieties and irregularities in the pre-election before the vote was taken to the extent that they could be substantiated and verified before the Labour Relations Officer. It is not pleaded that they did not know in advance of the vote, merely that they did not know to that extent. The employer does not plead lack of knowledge. The Board's notices are quite clear that complaints are to go to the Returning Officer, usually a Labour Relations Officer. It is not necessary to substantiate matters before the vote; it is necessary to raise them. The Consent and Waiver forms signed by all parties are expressly designed to prevent objections being pursued only when the results of votes are unfavourable. See, for example, *Bermay Corporation*, [1980] OLRB Rep. Feb. 166 and *Harolds Furs*, [1983] Nov. 1843.

12. Accordingly, we confirm both the oral ruling given on the day of hearing, and the results of the vote.

13. A certificate will issue to the applicant for the bargaining unit set out in the Board's October 26, 1988 decision.

0951-88-U National Automobile, Aerospace & Agricultural Implement Workers Union of Canada - (CAW-Canada), Complainant v. Ronal Canada Inc., Respondent

Discharge - Unfair Labour Practice - Discharge of one of the main employee organizers for the CAW two months after the CAW was certified - Employee discharged because he entered the Personnel Manager's office without permission - Board dismissing complaint - Employee not discharged because he attended the certification hearing or because of his union activity generally

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

APPEARANCES: *Clare Meneghini*, *Maurice Racine* and *Craig Grant* for the complainant; *Paulene Pasioka* and *Armin Torweihe* for the respondent.

DECISION OF THE BOARD; January 9, 1989

1. This is a complaint under section 89 of the *Labour Relations Act* in which the National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (hereinafter referred to as "CAW") complains that Ronal Canada Inc. (hereinafter referred to as "Ronal") contravened sections 3, 64, 66 and 80 of the Act when it discharged Maurice Racine on July 14, 1988.

2. A. Torweihe, the Controller and the person in charge of the Personnel Department, L. Warner, the Maintenance Manager, J. Gibbs, a cleaner, and R. Miller, a guard employed by Burns Security, were called to give evidence by Ronal. The CAW called C. Grant, an organizer for the CAW, and M. Racine to testify. In making its factual determinations, the Board has consid-

ered all of the oral and documentary evidence, the credibility of the witnesses and the submissions of the parties concerning the evidence.

3. Ronal is in the business of manufacturing aluminum cast automobile wheels. Ronal began production in January 1988 and started to hire its workforce a short time prior to 1988. Racine, for instance, was hired as an electrician in mid-November, 1987. The CAW began its organizing campaign in early April 1988. The date of the hearing of its certification application was May 13, 1988 and the Board subsequently issued a certificate dated May 24, 1988 certifying the CAW as the bargaining agent for a unit of Ronal's employees. Racine was one of the main employee organizers for the CAW. He collected a significant number of membership cards and during the organizing campaign he wore a CAW T-shirt while working. Racine attended the certification hearing at the Board on May 13, 1988 and it is this, as we understand it, which forms the basis for the CAW's allegation that Ronal breached section 80 of the Act. Within two weeks of the certificate issuing, the CAW conducted a vote to elect a bargaining committee. Although nominated for a position on the bargaining committee, Racine was not elected.

4. Between the hours of 1:00 a.m. to 3:00 a.m. on July 9, 1988, Racine went into the office of the Personnel Manager, G. Pisano. Racine's shift began at 7:00 p.m. on July 8 and ended at 7:00 a.m. on July 9, and during this time he was unsupervised. Gibbs advised Warner, Racine's supervisor, that she saw Racine in Pisano's office. Warner and Pisano confronted Racine about the incident on July 10. Racine told them he went into Pisano's office to get a copy of the *Occupational Health and Safety Act*. He admitted to them that he had no authorization to enter Pisano's office and told them that the security guard let him into the office. Warner advised Racine that he was suspended indefinitely. On July 13, 1988, Ronal further investigated the incident by conducting three separate interviews. Dr. K. Lombeck, a senior representative from Germany, and Torweihe, who made notes at the interviews, were present for management at all of the interviews. Gibbs confirmed that she saw Racine in Pisano's office on July 9. The security guard denied that he unlocked Pisano's office for Racine. Warner was present during Racine's interview, as well as another employee who was there at Racine's request. During his interview, Racine said that the guard let him into the office and he again indicated that his purpose in going into the office was to obtain a copy of the *Occupational Health and Safety Act*. Since Racine explained that he wanted to review the Act in connection with an incident that originated at least a week previously, he was asked why he had to enter Pisano's office when he did. Racine indicated that the problem had not been corrected, that "enough was enough" and that he wanted to find a rule to clear up the matter. Racine admitted that he was wrong to enter Pisano's office. The management representatives made it clear that the only issue for them was the fact that Racine was in the Personnel Manager's office without permission. At the conclusion of Racine's interview, he was advised that Ronal would advise him of its decision on the following day. On July 14, Warner advised Racine that Ronal no longer required his services.

5. Torweihe was the primary witness called by Ronal to explain why it terminated Racine's employment. He testified that the only reason Racine was terminated was because he was in the Personnel Manager's office without permission. This office contains the kind of records concerning employees that one might expect would be located in such an office. For security reasons, the door to Pisano's office was always locked when Pisano was not in his office and it appears that it was locked on occasion even when Pisano was in the office. Torweihe testified that the management was of the view that Racine's unauthorized entry into this particular office constituted a serious breach of a company rule and a serious breach of trust from an unsupervised employee. He indicated that it was for this reason and this reason alone that Ronal determined that termination was the only appropriate response. Torweihe testified that Racine's union activity was not a factor in Ronal's decision. Ronal did not accept Racine's reason for entering the office or Racine's assertion

that the security guard opened the door for him. Ronal believed the security guard when he said that he did not open the door of Pisano's office for Racine and suspected that Racine opened the office with a key he had duplicated while in possession some time previously of a master key. Given the amount of time that elapsed from the incident which caused Racine to want to review the Act and July 9, Ronal had difficulty in accepting his explanation for entering the office. But even though Ronal had some difficulties with these two aspects of Racine's version of the events, it is clear from Torweihe's evidence that these matters had no bearing on Ronal's ultimate decision. Again, he testified (which incidentally was confirmed by Warner's evidence) that the only reason Ronal terminated Racine's employment was because he was in the Personnel Manager's office without permission.

6. The CAW argued that Ronal terminated Racine at least in part because of his union activity. It did not argue that Racine did not deserve some discipline for entering Pisano's office. However, it contended that Ronal's response was extreme in the circumstances. The CAW also argued that the discipline Racine received prior to the CAW's certification and Ronal's failure to apply its employee handbook should lead the Board to infer that Racine's termination was motivated by anti-union considerations.

7. We do not find it necessary to detail the evidence concerning the incidents which led to certain discipline being imposed by Warner on Racine prior to the CAW's certification and during the organizing campaign. Suffice it to say that in mid-April, Warner orally advised Racine not to use the photocopy machine without permission. Approximately a week later, Warner gave Racine a written warning for going to another management person rather than first bringing the matter to Warner's attention. In May, Warner verbally advised Racine that he should not use the phone in other departments without permission.

8. Ronal's employee handbook outlines the benefits, rules and important personnel policies at Ronal. The handbook lists forty-three factory rules along with certain penalties for violating each rule. Rule 33 prohibits entering restricted areas without specific permission and provides a warning for a first offence, three days off for a second offence and discharge for a third offence.

9. Section 89(5) is applicable to the allegations made by the CAW. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board addressed the effect of the section 89(5) reversal of the onus of proof as follows:

Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

10. In contested section 89 complaints, one would not expect an employer to openly admit it acted in contravention of the Act. In assessing the reasons for an employer's conduct, the Board's task, in essence, is to examine all the circumstances of a particular case in order to determine whether an employer's reason(s) are based on anti-union considerations. After reviewing the relevant evidence in this case, as well as the parties' submissions, the Board finds that Ronal did not contravene the Act when it terminated Racine's employment.

11. After reviewing the evidence relevant to Racine's treatment by Ronal prior to certification, it is difficult to conclude that this treatment constitutes a contravention of the Act or was connected in some way with Ronal's decision in July to terminate Racine's employment. Torweihe testified that he and the others involved in deciding Racine's employment fate were aware of the earlier discipline but that the minor incidents were not a factor in Ronal's decision. If the discipline

was illustrative of an attempt to penalize Racine for his union activity or to set Racine up for discharge, which in effect is what the CAW argued, one would have expected Ronal's response to have been more severe. A couple of verbal warnings and one written warning do not establish, in the circumstances before us, that Ronal was attempting to respond to Racine's union activity. The evidence does not support the CAW's argument that it was only when Racine commenced his union activity that Ronal began to discipline him. In January 1988, before the organizing campaign began, Warner spoke to Racine about discussing matters with senior managers before or without first talking to Warner. It was this kind of an incident which led to the written warning in April. We note that both Racine and Warner testified that they had a good working relationship and that the evidence indicates that Warner was the only management person involved in the imposition of the minor discipline. The evidence does not suggest that Warner played a determinative role in Racine's discharge. The Board can appreciate why the CAW placed a considerable amount of emphasis on Ronal's previous treatment of Racine. However, that treatment was not illegal and we accept Torweihe's evidence that it was not a factor in Ronal's decision to discharge Racine.

12. The failure of an employer to follow a disciplinary policy may be a matter from which the Board can infer that the true reasons for the discharge may be other than the reasons offered by the employer. Torweihe testified that the handbook is normally followed but that in Ronal's view, it had no application to the infraction committed by Racine. The Board accepts Torweihe's evidence that Ronal viewed Racine's offence, that of entering the Personnel Manager's office without permission, as very serious and requiring the response of discharge. In these circumstances, the Board finds it inappropriate to draw the inferences suggested by the CAW.

13. As noted earlier, the Board's task is essentially to determine the reason(s) for the conduct alleged to contravene the Act. The Board's primary task is not to determine whether an employer's conduct can meet a just cause standard. Although a disproportionate disciplinary response may cause the Board to question the motives of an employer, this does not alter the Board's objective of determining the real reasons for the employer's conduct. Whatever the Board's view is of Racine's misconduct, it is satisfied that Ronal's response was not so extreme in all the circumstances that we should infer an illegal motive.

14. Racine's discharge occurred approximately two months after the CAW was certified. There is no evidence to suggest that Racine played any role in the union after he failed to be elected on the bargaining committee. The question of the timing of the discharge, which is always an important factor, does not favour the CAW in this case. The Board finds there is no evidence to support the CAW's contention that Ronal was simply biding its time and waiting for the appropriate moment to discharge a key employee organizer. In reviewing all of the circumstances, including the timing of the discharge, Ronal's earlier treatment of Racine, the manner in which Ronal investigated the incident, the Board finds that the only reason Ronal discharged Racine is because he entered the Personnel Manager's office without permission, and not because he attended the certification hearing or because of his union activity generally.

15. Accordingly, this complaint is dismissed.

2420-88-R; 2421-88-R Independent Canadian Transit Union, Applicant v. **The Smiths Falls Community Hospital - North Unit**, Respondent v. Canadian Union of Operating Engineers and General Workers, Intervener; Independent Canadian Transit Union, Applicant v. **The Smiths Falls Community Hospital - South Unit**, Respondent v. Canadian Union of Operating Engineers and General Workers, Intervener

Certification - Membership Evidence - Pre-Hearing Vote - One membership card submitted by applicant bearing no indication of the amount paid in respect of initiation fees or dues by the worker - Omission raising question about the reliability of the Form 9 declaration - Matter to be addressed at a hearing after the vote is conducted

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF THE BOARD; January 31, 1989

1. These are two applications for certification in which the applicant has requested that a pre-hearing representation vote be conducted. In accordance with the Board's usual practice, a Labour Relations Officer was appointed to meet with representatives of the applicant, respondent and intervener ("the participants") in each application to ascertain and discuss their positions with respect to the merits of the application and the conduct of any pre-hearing representation vote and report thereon to the Board.

2. The participants in Board File 2420-88-R agree that the respondent and intervener were parties to a collective agreement which expired December 31, 1988. They agree that the employees affected by this application are the employees who were covered by that collective agreement and that the voting constituency for the purpose of any pre-hearing representation vote should be as described in the scope clause of that collective agreement. It appears from the reply filed by the respondent that the employees in question are employed at 60 Cornelia Street West in Smiths Falls. On an examination of the records of the applicant and the records of the respondent, it appears that not less than thirty-five per cent of the employees of the respondent in that voting constituency were members of the applicant at the time the application was made. Accordingly, we direct that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All stationary engineers and persons primarily engaged as their helpers employed in the power house of the Hospital save and except chief engineers and persons above the rank of chief engineer

with the clarity note that "the power house in question is the power house which services the Hospital premises at 60 Cornelia Street West, Smiths Falls, Ontario". All those employed in the voting constituency on January 20, 1989 who are so employed on the date the vote is taken shall be eligible to vote. Voters shall be asked whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

3. The participants in Board File 2421-88-R agree that the respondent and intervener were parties to a collective agreement which expired December 31, 1988. They agree that the employees affected by this application are the employees who were covered by that collective agreement and that the voting constituency for the purpose of any pre-hearing representation vote should be as described in the scope clause of that collective agreement. It appears from the reply filed by the

respondent that the employees in question are employed at 35 Elmsley Street South in Smiths Falls. On an examination of the records of the applicant and the records of the respondent, it appears that not less than thirty-five per cent of the employees of the respondent in that voting constituency were members of the applicant at the time the application was made. Accordingly, we direct that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All stationary engineers and those persons primarily engaged as their helpers employed in the power house save and except chief engineer and those above the rank of chief engineer

with the clarity note that “the power house in question is the power house which services the Hospital premises at 35 Elmsley Street South, Smiths Falls, Ontario”. All those employed in the voting constituency on January 20, 1989 who are so employed on the date the vote is taken shall be eligible to vote. Voters shall be asked whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

4. As the “Independent Canadian Transit Union” has not been found to be a trade union in any previous Board decision, the ballot boxes in the representation votes in each of these two applications shall be sealed and the ballots cast shall not be counted unless and until the Board determines that the applicant is a “trade union” within the meaning of clause 1(1)(p) of the *Labour Relations Act* (“the Act”).

5. The persons who represented the respondent “The Smiths Falls Community Hospital - North Unit” in the participants’ meeting with the Board’s Labour Relations Officer in Board File 2420-88-R are the same persons who represented the respondent “The Smiths Falls Community Hospital - South Unit” in the participants’ meeting with the Labour Relations Officer in Board File 2421-88-R. Those persons advised the Labour Relations Officer that the names “The Smiths Falls Community Hospital - North Unit” and “The Smiths Falls Community Hospital - South Unit” describe two separate and distinct legal entities. It has been the Board’s experience that lay persons and even lawyers involved in employment matters are prone to the misconception that an operating division of a corporation is a legal entity separate and distinct from any other division of that corporation. For that reason, we are inclined to wonder whether the names of the respondents in these two files are not names under which a single legal entity operates separate divisions or departments at separate locations. If this is the case, the panel which deals with the merits of these applications after the pre-hearing representation votes have been conducted will no doubt wish to consider amending the description of the respondent employer and describe the appropriate bargaining unit in each application in accordance with the approach described in *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815. Accordingly, the participants should address this point in the submissions they file with respect to each application in response to the Notice of Returning Officer’s Report in that application.

6. We note that one of the combination application for membership/receipt cards filed in connection with Board File 2421-88-R bears no indication of the amount, if any, which was paid to the trade union by the applicant for membership in respect of initiation fees or monthly dues of the trade union. This obviously raises a question about the adequacy of this document as evidence of membership as defined by clause 1(1)(l) of the Act. Less obvious, but potentially more serious, is the question this raises about the reliability of the Form 9 declaration filed by the applicant’s National President. Paragraph 3 of that declaration reads as follows:

(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inqui-

ries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money *the amount shown thereon* on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

[emphasis added]

No exceptions are noted on the declaration. One is bound to ask how, if he did examine the cards and make the inquiries referred to in this paragraph, the declarant could have signed this declaration without first noting thereon, as an exception to paragraph 3, that one of the receipts to which it relates does not have any "amount shown thereon". As the answer may be that he did not do what is expected of a Form 9 declarant, this is a matter which will have to be addressed at a hearing after the vote is conducted: see *Williams Machines Limited*, [1972] OLRB Rep. Oct. 879; *Maple Leaf Mills Limited*, [1984] OLRB Rep. July 986 and [1984] OLRB Rep. Oct. 1474; and, *Pebrar Pet-erborough Inc.*, [1988] OLRB Rep. Jan. 76.

7. The matter is referred to the Registrar.

0749-88-R United Brotherhood of Carpenters and Joiners of America Local 27, Applicant v. **Widcor Limited** and Green-King Ltd., Respondents

Construction Industry - Related Employer - Remedies - Sole officer and shareholder of Green-King Ltd. is the construction manager of Widcor Ltd. - Widcor Ltd. using the construction services of Green-King Ltd. to construct a car dealership - Board finding sufficient common direction and control to make one employer declaration but declaration limited to protecting the union's bargaining rights to those instances where Green-King Ltd. and Widcor Ltd. together engage in working in the construction industry

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

DECISION OF THE BOARD; January 31, 1989

1. In the decision of the Board dated November 4, 1988, we rendered a "bottom line" decision in this matter and indicated that our reasons for that decision would follow. In the decision we declared that, "for purposes of the *Labour Relations Act*, and *only* in those instances where Widcor Limited and Green-King Ltd. *together* engage in the constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works, they shall together be treated as constituting one employer". We now provide our reasons for making such declaration.
2. Green-King Ltd. ("Green-King") was incorporated in December 1982. Its only officer and sole shareholder is Mr. Ian Barclay. From the time of its incorporation until mid 1985, Green-King Ltd. was in the construction business. The construction projects of Green-King were in Florida. Green-King was not engaged in the construction industry in Canada during this period of time.
3. From May 1986 to April 15, 1988, Mr. Ian Barclay was employed as a construction

manager by the respondent Widcor Limited (“Widcor”) then known as Wharton Industrial Developments Ltd. During this period of time when Mr. Barclay was so employed, Green-King was essentially dormant and was not engaged in the construction industry in Canada or anywhere else. As construction manager for Widcor Mr. Barclay was responsible for the day to day management and all aspects of the construction business of Widcor. His responsibilities included preparation of the budget estimates, negotiations of most of the subcontracts, and responsibility for administration in the field.

4. Widcor is a multi-faceted company which was incorporated approximately twenty years ago. Its sole shareholder is Robert E. Wharton. The President of Widcor is Ms. Kari Adams who is also a director of the company. Mr. Wharton is the Chairman of the company and is also a director of the company. Other than as referred to herein there is no relationship, contractual or otherwise, between the owners, shareholders and directors of Green-King and Widcor. In respect of the construction business of Widcor, we note that Mr. Wharton’s involvement in that aspect of the business varied and was somewhat dependent on his own personal interest in the construction project.

5. Until recently Widcor was engaged primarily in the construction of industrial and commercial projects. Widcor’s original business was limited to construction and some land development. In recent years however, the company went into the hotel business. By the spring of 1988 the company owned the Wharton Hotel in London, Ontario, the Ramada Hotel near the airport in Toronto, and the Renaissance Hotel in Scarborough.

6. While employed as Construction Manager for Widcor, Mr. Barclay had responsibility for the construction of the Wharton Hotel in London, Ontario. He was originally and primarily employed to oversee that construction project. Widcor was also engaged in a number of other construction projects including the Dixie Road Auto Campus upon which work commenced in the winter of 1986. It is the construction of a Chrysler car dealership at the Dixie Road Auto Campus which gave rise to the filing of this application.

7. The Dixie Road Auto Campus site was a concept developed by Mr. Robert Wharton. He assembled the required land upon which a number of auto dealerships have been built. The Auto Campus concept may be likened to a retail shopping mall. It is a one-stop automobile “mall” where consumers can shop and compare the various products of the automobile market. The Dixie Road Auto Campus currently consist of six-car dealerships - Toyota, Honda, Nissan, Mazda, General Motors and Chrysler. With the exception of the land upon which the General Motors dealership was built, Widcor owns the land and premises of the dealerships and has entered into long term, twenty-year leases with the owners of those car dealerships. The General Motors site has been subdivided from the remainder of the land and is owned by General Motors. Prior to the events which gave rise to this application, Widcor designed and built each of the dealerships. With respect to the Honda, Toyota, Mazda, and Nissan dealerships, Widcor built the dealerships as owner/landlord of the land and the building. With respect to the General Motors dealership, although Widcor is not the owner or landlord of the building which houses the G.M. dealership, Widcor did design and construct the dealership on a “construction management” basis. At the time of the circumstances relevant to our determination, work had been substantially completed on the first four dealerships namely Honda, Mazda, Nissan and Toyota. Work had been commenced and was still on progress at the General Motors dealership site. Prior to the termination of his employment with Widcor Mr. Barclay’s responsibilities as construction manager included responsibility for this Auto Campus project. There remains space for one, and perhaps two car dealerships on the remainder of the Dixie Auto Campus property. Mr. Wharton has had some preliminary discussions with Ford about a car dealership at that site. At the time of the hearing any details of such a dealership were far from being finalized. In addition, Widcor also owns a four-acre site on the

south side of the Auto Campus. The property is currently zoned for commercial use and is not zoned for a car dealership.

8. In the early months of 1988, for reasons irrelevant to our determination, Mr. Wharton determined that Widcor ought to divest itself of most of its holdings and should cease to do any direct construction work. Subsequently, Widcor sold the three hotels it owned and wound up its construction operations.

9. At the time Mr. Wharton made this decision, Widcor was in the midst of negotiating with Chrysler Canada to build and lease to Chrysler a car dealership at the Dixie Auto Campus. Mr. Barclay was advised by Mr. Wharton of his intentions to sell and wind up Widcor's operations, and presumably gave some thought about the effect those plans would have upon his own continued employment. Mr. Barclay decided that he was interested in reactivating his construction business and continue to work in the construction industry on his own behalf. While still an employee of Widcor he negotiated with, and subsequently entered into a lump sum or stipulated price contract to build the Chrysler dealership with Widcor. That contract is dated March 25, 1988. Mr. Barclay's verbal tender to Mr. Wharton was made on March 10, 1988 approximately a month before the termination of Mr. Barclay's employment. Work actually commenced on the site on May 9, 1988.

10. In his testimony Mr. Wharton listed some immediate benefits to Widcor in agreeing to have Mr. Barclay and/or Green-King construct the Chrysler dealership on a stipulated price contract basis. According to Mr. Wharton, Mr. Barclay was familiar with the site and the type of building which was to be constructed. Mr. Wharton indicated that car dealerships are a somewhat specialised type of building. One can readily see that by entering into the contract with Green-King, Widcor could ensure that the building which it would ultimately own was constructed with some expertise and experience by someone familiar not only with the construction of car dealerships in general, but someone who had particular and specific expertise and experience with the Dixie Auto Campus. The idea of having Mr. Barclay nearby in the event that there was any problem or issue that arose in respect of the five other dealership was also specifically referred to as a benefit to Widcor by Mr. Wharton. Mr. Wharton was also pleased that by entering into this arrangement, Widcor could act "solely as a developer". In this way it would avoid the risks of, or exposure to, construction cost overruns. According to Mr. Wharton, the price Widcor quoted to Chrysler, was the price Widcor itself paid to Green-King. Finally, Mr. Wharton testified that the arrangement also permitted him to avoid any liability that might occur if he were to terminate the employment of Mr. Barclay as a result of Widcor's decision to divest itself of its construction business.

11. At present Widcor is concentrating its efforts in continuing its Real Estate Development business. Although Widcor is not presently engaged in the construction industry, Mr. Wharton testified that Widcor could recommence its construction business at some point in the future if circumstances dictated. According to Mr. Wharton, Widcor continues to have that option available.

12. We now turn to examine the relationship, contractual and otherwise between and amongst Widcor and Green-King and Chrysler in respect of the Chrysler dealership at the Dixie Auto Campus.

13. In 1987, Widcor initially entered into negotiations with American Motors Corporation ("A.M.C.") in respect of what later came to be known as the Chrysler dealership site. At that time, certain preliminary proposals were made, there was some negotiation back and forth between Widcor and A.M.C. but eventually an A.M.C. dealership on that site was "shelved". In the early months of 1988, however, (and after Chrysler had purchased A.M.C.), the thought of a

Chrysler Jeep/Eagle dealership at the Auto Campus was revived. Actual negotiations in respect of the site proceeded quickly once the matter was reactivated.

14. On February 2, 1988, Mr. Ronald Carter, architect, made a preliminary presentation and presented a set of drawings to representatives of Chrysler Canada Ltd. Mr. Carter was described by Mr. Barclay as the “in-house” architect for Widcor. Mr. Carter was not an employee of Widcor. He did however, maintain his offices at Widcor’s Head Office for two years and, according to Mr. Wharton, acted primarily as the company’s consultant. Widcor was the primary source of Mr. Carter’s work. In the spring of 1988 Mr. Carter established his own offices at another location. Mr. Carter had been the architect who had designed the other auto dealerships at the Dixie Auto Campus. On February 2, 1988 when he made his presentation to Chrysler Canada Ltd., Mr. Carter presented “the set of drawings prepared for Nissan as an example of what will be prepared for Jeep/Eagle”. Neither Mr. Wharton nor Mr. Barclay attended this meeting at which the design of the building to be constructed was discussed. Mr. Barclay did however receive a copy of the minutes of that meeting. The concluding item of those minutes is as follows:

Schedule

- Will begin working drawings immediately and be completed end of March.
- Anticipate site plan approval application end of February.
- Anticipate constructions starting at end of May, with seven months construction time.
- Suggest November occupancy.

There is further correspondence including a letter dated February 12, 1988 between the Chrysler Canada representative and Mr. Carter in respect of the design. Thereafter, Mr. Carter designed the building. Suffice it, to say that by March 15, 1988, he had designed the building, and had submitted the architect’s drawings A1-2, A2-2 and A3-2 to Chrysler. These drawings were to Chrysler’s specifications.

15. Widcor eventually entered into a construction contract and lease agreement with Chrysler. That contract was not formally concluded until some time after May 5, 1988 (as evidenced by a letter dated May 5, 1988 from Mr. Barclay to Mr. Wharton). According to Mr. Wharton, the construction contract between Chrysler and Widcor was “mirrored” on the construction contract between Green-King and Widcor. Green-King did not enter into any contractual relationship with Chrysler directly. The stipulated price contract dated March 25, 1988 between Green-King and Widcor is for a price of one million fifty-nine thousand four hundred and fifty-three dollars (\$ 1,059,453.00). The contract includes the March 15, 1988 drawings prepared by Mr. Carter and notes:

“subsequent drawings shall reflect the intent of the drawings and specifications noted above. Architectural, site-grading, site-servicing and land-scaping drawings shall be undertaken by Ronald H. Carter, Architect. Structural, mechanical and electrical drawings shall be undertaken by Green-King”.

From the totality of the evidence we conclude that the contract price of \$1,059,453.00 was agreed upon at a time when the structural, mechanical and electrical drawings (each one a significant cost item in the total contract price) had not yet been prepared by Green-King or anyone else.

16. Mr. Barclay testified that he arrived at the contract price he quoted to Widcor in the following manner. He examined the preliminary drawings of Mr. Carter and procured as many sub-trade prices as possible. He compared those prices with his own estimates. For those items for

which he could not obtain any quotes from sub-contractors, Mr. Barclay calculated the cost of materials and estimated the cost of labour. For example, because structural drawings had not yet been completed, Mr. Barclay obtained a "pounds per square foot" figure from the structural engineers, took that to a steel manufacturing company and obtained the cost for Joists and structural steel. He estimated the costs of such general overhead requirements as trailer, telephone, salary to superintendent, rental of small tools, etc. Mr. Barclay estimated the cost of the jobs non-productive, on site overhead and made calculated estimates on certain other matters such as land-scaping and sewers and watermain. After he completed his calculations Mr. Barclay presented Mr. Wharton with his calculation of the cost required to complete the Chrysler dealership. He calculated the cost to be \$1,009,453.00. Thereafter, and to quote Mr. Barclay, "from that [we] negotiated a fee on top" which ultimately was \$50,000.00. In calculating the \$1,009,453.00 cost of the building Mr. Barclay used the same or similar structure, methodology or sources as he did in calculating the cost of building the five car dealerships which already formed part of the Dixie Auto Campus.

17. The contract price of \$ 1,059,453.00 with Green-King, (or generally the cost of constructing the premises of the other five car dealerships already on site) was significant to Widcor. It is the price of the land together with the price of the improvements to the land (building, services, etc.) which essentially determines the rate of rent to be paid by the lessee (in this case Chrysler) to the landlord/owner (Widcor). In respect of the Chrysler dealership site, Widcor wanted a return rate capped at 10 percent i.e. the rent was to be fixed at 10 percent of the total of the fixed value of the land and building. Mr. Wharton testified that he did not enter into the contract with Green-King until Widcor had a firm commitment (including the commitment to lease at a specified rent) from Chrysler. That commitment was made some time prior to March 22, 1988 (as is evidenced by Mr. Wharton's letter to Chrysler Canada confirming the lease rate for the initial five year period of the lease). From the totality of the evidence we conclude that Widcor would not have entered into the contract with Green-King in the amount specified, but for the agreement that it was able to reach with Chrysler in respect of the terms of the lease. Similarly, Widcor would not have entered into the construction and lease agreement with Chrysler but for the price of the construction contract it was able to negotiate with Green-King.

18. In explaining these various arrangements Mr. Wharton described his roles as an "investor/developer" but stated that the "real negotiations on the specifications of the building was done with me as go-between Chrysler and Green-King". As noted, there is no direct construction contract between Chrysler and Green-King. In order to deal with the possibility that extra construction costs might be incurred, including costs incurred as a result of changes requested by Chrysler, Mr. Barclay and Mr. Wharton inserted the following clause in their contract.

Appendix B

1. Any changes to be approved and paid directly by Chrysler to the contractor.
2. Wharton Industrial Developments will not be responsible for any additional costs for any reason as the project is a total turn key project.

There is no evidence or suggestion that a similar provision is to be found in the contract between Widcor and Chrysler. In fact, Chrysler has made certain separate arrangements with Green-King in respect of some minor matters not included in the contracts between Chrysler and Widcor or between Widcor and Green-King. Apart from these minor matters however, if Green-King's construction costs were less than or greater than the \$1,059,453.00 quoted to Widcor, any loss or profit would lie with Green-King. Mr. Barclay had also prepared the construction costs estimates of the buildings in respect of the other five dealerships at the Auto Campus. It was Mr. Barclay's estimates which Widcor used to negotiate the lease with the owners of those dealerships. In those

instances however, if Mr. Barclay had somehow miscalculated the cost of the building, the financial loss or profit caused by such miscalculations (both in terms of the immediate loss of profit on the building and the long term loss or profit from the lease arrangement) would be born by Widcor.

19. The actual construction of the Chrysler dealership was done by subcontractors who entered into subcontract agreements with Green-King. In addition to Mr. Barclay, the only other employees employed by Green-King are Mr. Barclay's two sons and a superintendent. Mr. Barclay's wife performs a book-keeping functions for Green-King. There is no evidence that, with the exception of Mr. Barclay himself, any of these persons had previously been employed by Widcor.

20. We heard a significant amount of evidence in respect of the subcontractors engaged in the construction of the Chrysler dealership, and the subcontractors engaged in constructing the other 5 dealerships. On the Chrysler site, Green-King engaged a number of subcontractors some of whom had previously acted as subcontractors to Widcor in respect of one or more of the other dealerships which had already been built on the auto campus. The sub-contractors engaged by Widcor to complete certain types of work at the other 5 dealerships varied from dealership to dealership. For example, OPEC Drywall was a subcontractor for the drywall work for the Chrysler dealership. That company was also the drywall subcontractor for the Honda dealership but was not engaged as a drywall subcontractor for any of the other dealerships. Similarly, Plan Electric was the electrical subcontractor engaged in the Chrysler dealership. That company also did some electrical work as a subcontractor to Widcor in respect of the Mazda and Toyota dealership. In the circumstances of this case we attach no great significance to the fact that some of the subcontractors engaged by Green-King had previously acted as subcontractors to Widcor. The nature of the general contracting business is such that work is subcontracted. There are a certain number of general contractors and a certain number of subcontractors in the construction industry. Some of these general contractors and subcontractors have developed specific expertise in certain types of construction. In the circumstances of this case there is nothing unusual or sinister in the fact that two general contractors engaged the same subcontractors on different occasions. That set of circumstances appears to be almost inevitable. We do concur however with the observation made by applicant's counsel in argument that Mr. Barclay had available the existing structure and existing organization, both in the sense of his own expertise and the existence of the subcontractors who had performed or were still performing work at the other 5 dealerships at the Dixie Auto Campus, when he tendered his oral bid to Widcor. As noted earlier, Mr. Barclay's duties as Construction Manager for Widcor included the negotiations with subcontractors.

21. As work progressed, Green-King made regular, monthly applications for payments for work completed to date to Widcor. The architect would certify the amount to which Green-King was entitled. Widcor paid the amount certified by the architect. With the exception of a ten thousand dollar differential on the last and final request for payment, the architect always certified the amount shown as due by Green-King. The architect who completed these certificates for payment was Ronald H. Carter, the architect who had designed the building and the person who was described as "in-house" architect for Widcor.

22. Notwithstanding the fact that the value of the contract was substantial, Green-King did not obtain, and Widcor did not require it to obtain, any bond to ensure performance. Mr. Wharton explained this by stating that he knew that Green-King as a "reconstituted" company which had not been operative for some time, could not obtain the necessary bonding for a project of this size. Mr. Wharton knew Mr. Barclay and had an "understanding" with Mr. Barclay that he, Mr. Wharton, could review Green-King's records to ensure that proper payments had been made to the subcontractors on site "at any time", and before Widcor would issue a cheque for any specific draw.

This safeguard, together with the requirement that payment was made only after the architect had certified the work had been completed was sufficient for Widcor's purposes. Mr. Wharton felt that as he himself was familiar with the construction industry he was not in any exceptional jeopardy. In response to a question as to what he would do if Green-King, for any reason, could not complete project, Mr. Wharton indicated he would either do it himself or use someone else to complete. Mr. Wharton did in fact avail himself of the opportunity to examine Green-King's records to ensure that payment to the subcontractors had been made.

23. Before examining the applicable law we note the following additional facts. As between Widcor and Green-King there are no common principals, shareholders or directors. There are no common logos, nor is there any evidence that the solicitors, accountants, banks or bookkeeping or office personnel are common to both companies. The exception to this of course is Mr. Barclay. The companies do not share the premises nor is there a common telephone. Green-King's Head Office is at Suite 9, 1200 Aerowood Drive, Mississauga, Ontario. Although that property is owned by Widcor, Green-King has subleased its portion of the premises from 3-L Sound Reinforcement Ltd., a company unrelated to either Widcor or Green-King. Widcor's Head Office is at suite 50, 1200 Aerowood Drive, Mississauga. Green-King does not now and has not in the past owned or otherwise obtained any of the assets formerly owned or used by Widcor.

24. On the other hand, each of the two respondents was, at the relevant time acting as a general contractor in the construction industry. Each operated primarily through the use of subcontractors. The work performed by the employees of the respondents is similar and requires similar skills. Green-King has not engaged in any construction projects in Canada other than the Chrysler dealership. It has not bid upon any other projects and its sole source of work to date has been Widcor. Finally, we note that at the relevant time control over labour relations for Widcor rested with Mr. Barclay. While employed at Widcor, Mr. Barclay was the person who, in fact, directed the activities which gave rise to employment and who on, December 22, 1987 and on February 16, 1988 signed, on behalf of the employer, certain minutes of settlement between the applicant and Widcor's predecessor (Wharton Industrial Developments Ltd.). We further observe that in the latter minutes of settlement the respondent employer (Widcor) agrees that (a) it is bound to the carpenters' provincial ICI collective agreement, (b) that collective agreement applies to the Dixie Auto Campus site and (c) the employer (Widcor Limited) "shall abide by the collective agreement in respect of all work performed in the future".

25. Within this factual framework we now turn to examine the law. A leading case which outlines both the purpose and effect of section 1(4) which is particularly applicable to the construction industry continues to be *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 where the Board stated:

12. Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

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15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in “associated or related activities or businesses” since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be “related” within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the “associated or related activities or businesses” need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

26. There are three conditions to be met before a common employer declaration can be made:

- (a) There must be more than one corporation, firm or individual association or syndicate involved.
- (b) These entities must be engaged in associated or related business activities, and
- (c) These entities must be under common control or direction.

27. In the circumstances of this case the first two criteria are easily identifiable. There are two corporate entities, Green-King and Widcor. Those corporate entities are carrying on associated or related activities within the broad meaning of those terms as defined in *Brant Erecting and Hoisting, supra*, at paragraph 15. Each corporate entity was a general contractor in the construction industry. Each performs some work directly with its own employees while at the same time contracting out certain other work. In addition, there is the functional interdependence which exist between the two entities in respect of the Chrysler dealership. Widcor as owner/developer of the land and owner/landlord of the dealership has entered into a construction and lease arrangement with Chrysler which obliges Widcor to build a specific type of dealership to Chrysler's specifications. Widcor has determined to build that dealership using a particular type of arrangement, namely the construction services of Green-King. The activities carried on by the two respondents with respect to the Chrysler site are complementary and there is a "symbiotic" relationship between the two business entities (see *Metropolitan Parking*, [1979] OLRB Rep. Dec. 1193).

28. The more difficult question is whether the two respondents are under common direction or control. The two companies are owned separately. Although there are no common directors, officers or shareholders, there are a number of factors which point to a common or joint direction or control. Any one of these factors standing alone or in isolation might have been insufficient to establish the third condition precedent to a section 1(4) declaration. Their cumulative effect, examined in the context of the total relationship however, has caused us to conclude that the applicant union has established sufficient common direction or control for the Board to make a declaration pursuant to section 1(4).

29. First, we note that entities can be under common control or direction without sharing common owners, shareholders, directors and officers. Notwithstanding the absence of such indicia, the Board will examine the contractual and economic arrangement between the two entities to see if these indicate functional interdependence sufficient to show two entities are under common control or direction. Thus, in *Donald A. Foley*, [1980] OLRB Rep. April 436, the Board stated at page 443:

But section 1(4) both allows and requires the Board to examine the degree of functional interdependence which exist between business entities so it must also look at the contractual and economic arrangements between them, and, in fact, at all elements of interdependence.

(See also *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9 at paragraph 104, *Kennedy Lodge Inc.*, [1984] OLRB Rep. Jul. 931 at paragraph 53).

30. Secondly, the Board has held that common direction or control can be found where two independently owned entities share in a commercial venture. In this regard we note the decision of the Board in *J.D.S. Investments Limited*, [1981] OLRB Rep. Mar. 294 where the Board stated at page 296:

16. The respondents contend that the two firms are not under common control or direction, and in this regard rely on the fact that Martin Ross Construction and J.D.S. Investments Limited have no common shareholders or officers. Although the existence or non-existence of common

shareholders and officers is certainly an important factor in deciding whether or not two firms are under common control or direction, the Board has indicated that it is not necessarily the determining factor and that the Board will also consider who, in fact, directs the activities which give rise to employment. See: *Evans-Kennedy Construction Limited* [1979] OLRB Rep. May 388 and *Donald A. Foley Limited*, [1980] OLRB Rep. April 436.

In that case the manner in which the two business entities shared responsibility for the construction of the project, and in particular the manner in which one entity supplied expertise to the other, led the Board to conclude that the entities were under common control or direction.

31. Similarly, we note the number of cases in which the Board has accepted that, *in appropriate circumstances*, section 1(4) may be broad enough to encompass subcontracting arrangements. For example in *Federated Building Maintenance Co. Ltd.*, [1985] OLRB Rep. Nov. 1585, the Board did not issue a section 1(4) declaration but did state at page 1594:

32. We accept the union's proposition that section 1(4) may be broad enough to cover some of subcontracting arrangements - especially those which do not involve "contracting out" but which might more appropriately be described as "contracting in" or "labour only" subcontracting. Where "A" enters into a relationship with "B", whereby "B" comes into "A's" premises to perform functions to "A's" detailed specifications which were or might be undertaken by "A's" own employees, there will inevitably be something of a "symbiotic relationship" between the two business entities. Their activities will be complementary. They will necessarily be "related" in a general sense, and efficiency will usually require that there be some degree of co-ordination. Moreover, the more closely the purchaser of employee services controls when, where, how, by whom, and at what price the employee services are provided, the more the activities will appear to be under *joint control or direction*. If at the same time, the subcontractor is effectively dominated by the purchaser or it appears that the notion of a subcontract was introduced to provide a separate non-union corporate vehicle which permits the purchaser to have the same work performed in much the same way as before, but beyond the ambit of its collective agreement, the Board may well find that a section 1(4) declaration is warranted.

(For similar observations see also, *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, *Donald A. Foley Limited*, *supra*, *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176, *Ontario 474619 Ltd.*, [1981] OLRB Rep. Oct. 1452). The particular facts and circumstances of the subcontracting arrangement are obviously crucial to such a determination. For example, subject to the provisions of the collective agreement, an employer may subcontract work. Such a subcontract must be *bona fide* and to a truly independent business entity. An employer cannot, through the use of a subcontracting arrangement, in effect subcontract to itself by entering into a subcontract arrangement with a company which it controls or directs.

32. Finally, in determining whether there is common direction or control, a number of cases have focused on who, in fact directs or controls the activities which give rise to employment. (See for example *Donald A. Foley*, *supra*, *J. D. S. Investments Ltd.*, *supra*, *Evans Kennedy Construction* [1979] OLRB Rep. May 388, *United Shelters Limited*, [1981] OLRB Rep. June 796, *J. H. Normick Inc.*, *supra*, *Penka Carpentry Ltd.* [1985] OLRB Rep. May 711).

33. In the circumstances of this case, we find the cumulative effect of the following factors to point to common direction or control. Mr. Barclay bid upon and entered into the stipulated price contract on behalf of Green-King while he was still employed as a construction manager of Widcor. Certainly, from a labour relations perspective, the relationship of master and servant is one in which there is an element of control by one party in relation to the other. As construction manager, Mr. Barclay's duties included estimating the cost of construction (a figure of great significance to Widcor Limited as it would ultimately be a major component of the equation used to determine the rent to be paid) and the selection of subcontractors. Mr. Barclay performed those same duties for Green-King. In a bid oriented sector of the construction industry, the essence of

the “business” frequently resides in the experience and expertise of its management personnel. In the broad sense, those expert and experienced management personnel control or direct the company, and in particular control or direct the activities which give rise to employment. Tendering projects, supervising work in the field, negotiating subcontracts are highly significant aspects of a general contracting company and often point to who has control or direction of the company and its employees. In the circumstance of this case, that control or direction was common to both Green-King and Widcor by reason of the presence of Mr. Barclay. The common management, the inter-relationship of operations and the centralized control of labour relations, (once again in the person of Mr. Barclay who for example executed minutes of settlement of two matters brought before the Labour Relations Board on behalf of Widcor and who supervised the work performed in the field for both Widcor Limited and Green-King) are factors which point to common or joint direction or control. (See *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, *Evans Kennedy Construction Ltd.*, [1979] OLRB Rep. May 388, *United Shelters Ltd.*, [1981] OLRB Rep. Jun. 796, *Colt Contracting Co. Ltd.* unreported Board file No. 2550-84-R decision dated November 13, 1986, and *Penka Construction*, *supra*).

34. We find that, from the moment that Widcor had its architect present proposals to Chrysler in respect of the dealership, Widcor continued to have some control over the project in the sense of what was going to be built and how and when it was going to be built. After having entered into the contract, Green-King and Widcor continued to have ongoing discussions about matters relating to the construction of the building. That type of “control” is not unusual when one remembers that, as owner of the property, Widcor would receive the benefit of the construction. Standing alone that type of input or “control” is generally insufficient to support a section 1(4) declaration. In this instance however, Widcor as owner/developer was not simply a purchaser of construction services, and Mr. Barclay, through Green-King was not simply a general contractor who happened to successfully bid upon a project. Widcor was intimately connected and involved in the negotiations in respect of the manner and type of construction which ultimately occurred through Green-King. Its involvement extended so far that it entered into its own construction contract with Chrysler “mirrored” on the contract it had with Green-King. In effect, Widcor was able to have the Chrysler car dealership built in much the same way and manner that it itself had constructed the other five car dealerships. Through its commercial contract with Green-King, Widcor’s affairs were structured differently, but the infrastructure which led to the construction of the Chrysler dealership by and large remained the same as the infrastructure which led to the construction to the other five dealerships. Mr. Barclay as construction manager for Widcor had developed for Widcor, and in determining the amount of his own bid was able to use for the benefit of Green-King, the existing organizational structure i.e. a list of subcontractors, subcontracting prices which had been tendered in the other dealerships built, the manner of construction of the other dealerships, etc. In this respect Mr. Barclay’s source of information cannot be characterized as the independent expertise of a new contractor.

35. We note also that the lack of bonding on the project, although not in and of itself unusual or a factor which, standing alone would lead to a section 1(4) direction, in this instance Green-King granted Widcor the right to examine Green-King’s books to ensure Green-King had met its own contractual obligations. This right was in fact exercised by Widcor. In a true arm’s length owner/general contractor relationship, one would not normally expect the general contractor to provide access to its books to an owner/client which had engaged its services.

36. In addition to these various factors which point to common or joint direction or control we also considered the fact that Green-King has not engaged in any other construction projects. It has not tendered any other projects and its sole source of work to date has been Widcor and the

Chrysler dealership. For its part Widcor did not seek any other tenders in respect of the Chrysler dealership.

37. As to whether we ought to exercise our discretion in the circumstances of this case, we note that Widcor is bound to the Carpenters' Provincial ICI collective agreement. It acquired certain work covered by that collective agreement. Pursuant to that collective agreement it is obliged to have that work performed by members of the applicant. Indeed, in paragraph 4 of the minutes of settlement entered into on February 16th, Widcor specifically acknowledged that that collective agreement applied to the Dixie Auto Campus site and that it, Widcor would "abide by the collective agreement in respect of all work performed in the future" in respect of the Dixie Auto Campus. The contractual arrangement which Widcor had with Green-King can, and does lead to the erosion of the union's bargaining rights. Work to which the applicant's collective agreement with Widcor Limited applies, has been transferred by Widcor to Green-King, a company not in a contractual relationship with the applicant.

38. On the other hand, in exercising our discretion, we were mindful of the fact that at present, Widcor no longer engages in the construction industry and has no present intention of reactivating its construction business. Mr. Barclay, faced with the loss of employment as a result of Widcor's winding down of its construction operations had a right to seize upon that opportunity to re-establish Green-King in the construction business. Had Mr. Barclay merely activated Green-King and gone out to bid as a truly independent general contractor on any other projects, without assistance, help or any support from Widcor, it is possible that a section 1(4) declaration would not have issued. It is the specific and somewhat unusual circumstances which surrounded the construction of the Chrysler dealership at the Dixie Auto Campus which caused us to determine that there was common direction or control. Absent those factors, a section 1(4) declaration may not have issued.

39. The making of a section 1(4) declaration has the effect of treating two corporate entities as constituting *one* employer for purposes of the Act. A section 1(4) declaration without qualification therefore would have the effect that the applicant union has bargaining rights for *both* Green-King and Widcor. Both will be bound by the provincial ICI collective agreement and as *one* employer, presumably each would be liable for any violations of that collective agreement or any violations of the *Labour Relations Act*. This would be so regardless of the fact that perhaps, in fact, only one legal entity was the "culprit" who violated the collective agreement or the Act. That result normally flows quite logically from a finding that two separate legal entities are under common direction or control. Where, as here however, the common direction or control comes from a unique set of circumstances relating specifically to the construction of a car dealership at the Dixie auto campus, and not from such traditional indicia as common directors, common shareholders, common officers, etc., the aforementioned results appear to be somewhat less logical. At present Widcor does not operate a business in the construction industry. It is a land developer and is in the midst of "setting up some money market and bond market operations." In the present circumstances it would be anomalous if, by reason of Widcor's construction venture in respect of the Chrysler dealership, Widcor is indefinitely responsible or accountable for the ongoing construction business of the general contractor which it engaged on that project. Obviously, and as acknowledged by Mr. Wharton, if at some time in the future Widcor itself again operates a business in the construction industry, Widcor continues to be bound to recognize the bargaining rights which the applicant trade union has acquired, and continues to be bound to any collective agreement then in force. Conversely, as Widcor has no other direction or control in respect of Green-King's construction business (other than the specific, joint direction or control that it shared with Green-King in respect of the construction of the Chrysler dealership), then although the section 1(4) declaration is intended to, and has the effect of protecting the bargaining rights which the union has acquired in

respect of Widcor, the section 1(4) declaration also has the effect of extending those bargaining rights to encompass Green-King wherever and whenever it operates in the construction industry. In the circumstances of this case that result appeared to the Board to be equally incongruous. As the Board has broad discretion and remedial powers (as specifically noted in the concluding words of section 1(4) which grants the Board the power to “grant *such* relief, by way of declaration or *otherwise, as it may deem appropriate*”) during the course of argument, we suggested to the parties that an appropriate declaration to be made was a declaration limited to protecting the applicant’s bargaining rights to those instances where Green-King and Widcor together engage in working in the construction industry as ultimately set out in our decision of November 4, 1988. Counsel for the union and Mr. Wharton on behalf of Widcor both indicated that they would have “no problem” with the Board making such a declaration. Mr. Barclay did not comment on the matter.

40. For all of these reasons we rendered our written decision on November 4, 1988.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1649-87-R: Ontario Public Service Employees Union (Applicant) v. The Saint Thomas Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at St. Thomas, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (139 employees in unit)

2563-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Dominion Construction Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

3339-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (Applicant) v. Kuhlman Plastics of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Blenheim, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff" (30 employees in unit) (*Clarity Note*)

1080-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation No. 638 (Respondent) v. Group of Employees (Objectors)

Unit: "all employees engaged in cleaning and maintenance at 1 and 3 Concord Place, North York, including resident superintendents, save and except property manager, those above the rank of property manager and office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1180-88-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Northern Transformer Inc. and Concord Prefabricating Co. Ltd. (Respondents)

Unit #1: "all employees of Northern Transformer Inc. in the Township of Vaughan, save and except foremen, persons above the rank of foreman, and office and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of Concord Prefabricating Co. Ltd. in the Township of Vaughan save and except foremen, persons above the rank of foreman, and office and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

1395-88-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. 510706 Ontario Ltd., o/a Superior Contracting (Respondent)

Unit: "all electricians and electrician's apprentices in the employ of the respondent in the industrial, commer-

cial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, and in the Town of Englehart, save and except non working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1565-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Carriere's Supermarket Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Town of Cochrane, save and except assistant store manager, persons above the rank of assistant store manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Town of Cochrane, save and except assistant store manager, persons above the rank of assistant store manager and office staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1625-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tecline Utility Contractors Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1660-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. I.T.L. Industries Ltd. (Respondent)

Unit: "all office employees of the respondent at its Chatham Plastics Finishing Division and Chatham Moulding Division in the Township of Raleigh, save and except supervisors, persons above the rank of supervisor and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

1746-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Amertek Inc. (Respondent)

Unit: "all employees of the respondent at 1101 Dundas Street East, Woodstock, save and except foremen, persons above the rank of foreman, office and sales staff" (62 employees in unit) (*Having regard to the agreement of the parties*)

1754-88-R: Ontario Public Service Employees Union v. Georgetown & District Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all paramedical employees of the respondent in Georgetown, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of October 20, 1988 being the date of application" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

1755-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Robinson Farm Drainage Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institu-

tional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1762-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Picker International Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Manufacturing Division in Bramalea, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, and employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (79 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1798-88-R: Ontario Nurses’ Association (Applicant) v. Extendicare Health Services Inc. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Cochrane save and except Administrator, Director of Care and persons above the rank of Director of Care” (2 employees in unit) (*Having regard to the agreement of the parties*)

1805-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. P.D.H. Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1806-88-R: Ontario Public Service Employees Union (Applicant) v. Toronto Hospital (Respondent)

Unit: “all medical laboratory technologists, technicians and their assistants employed by Toronto Hospital, Toronto General Division, at its medical laboratories under the Council of Heads of Laboratory Departments in Metropolitan Toronto, who are regularly employed for not more than 24 hours per week, save and except technologists-in-charge (Coagulation) and persons above the rank of technologists-in-charge, students-in-training, students employed during the school vacation periods, office and clerical staff, practising members of the medical and nursing professions and persons for whom any trade union held bargaining rights as of October 27, 1988” (50 employees in unit) (*Having regard to the agreement of the parties*)

1807-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. P.D.H. Construction Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1826-88-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. National Systems of Baking Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Application for Certification Withdrawn*)

Unit #2: “all employees of the respondent in the City of St. Catharines regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store managers,

persons above the rank of store manager, office and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

1838-88-R: Ontario Public Service Employees Union (Applicant) v. The Dufferin County Board of Education (Respondent)

Unit: “all educational assistants employed by the respondent in Dufferin County, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1988” (44 employees in unit) (*Having regard to the agreement of the parties*)

1842-88-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Pinty’s Premium Foods Inc. (Respondent)

Unit: “all employees of the respondent in the City of St. Catharines, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (142 employees in unit) (*Having regard to the agreement of the parties*)

1843-88-R: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc. (Respondent)

Unit: “all employees of the respondent at its Standard Industries Division, at its Standard Slag Cement Plant in the City of Stoney Creek, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (23 employees in unit) (*Having regard to the agreement of the parties*)

1844-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Prince Metal Products Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

1851-88-R: Canadian Union of Public Employees (Applicant) v. St. Clair West Meals on Wheels Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the executive director and persons above the rank of executive director” (24 employees in unit) (*Having regard to the agreement of the parties*)

1876-88-R: Canadian Union of Public Employees (Applicant) v. Oshawa & District Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent at its group homes in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and students employed on a co-operative training program in a school, college or university” (85 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent at its group homes in the Regional Municipality of Durham regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed on a co-operative training program in a school, college or university” (36 employees in unit) (*Having regard to the agreement of the parties*)

1895-88-R: Union of Bank Employees - Local 2104 CLC (Applicant) v. Ottawa Community Credit Union Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Ottawa save and except managers, persons above the rank of manager and the executive assistant to the general manager” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1900-88-R: United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Zotto Mechanical (1979) Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1932-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pilen Construction of Canada Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of November 14, 1988” (5 employees in unit) (*Having regard to the agreement of the parties*)

1939-88-R: Ontario Nurses’ Association (Applicant) v. Corporation of the County of Elgin (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Elgin Manor in the Township of Southwold, save and except Director of Nursing and persons above the rank of Director of Nursing” (11 employees in unit) (*Having regard to the agreement of the parties*)

1940-88-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses Brant-Norfolk Haldimand Branch (Respondent)

Unit: “all registered and graduate nurses engaged in a nursing capacity by the respondent in the County of Brant and the Region of Haldimand-Norfolk, save and except supervisors and those persons above the rank of supervisor” (101 employees in unit) (*Having regard to the agreement of the parties*)

1945-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Beaver Foods Ltd. (Respondent)

Unit: “all employees of the respondent at the American Express Administrative Building, 101 McNabb Street, in the Town of Markham, save and except supervisors, persons above the rank of supervisor, chef, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

1946-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Timbel Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1948-88-R: Ontario Secondary School Teachers' Federation (Applicant) v. North Shore Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the District of North Shore, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1954-88-R: Canadian Union of Public Employees (Applicant) v. Cornwall Public Library (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except Assistant Librarian, persons above the rank of Assistant Librarian, Chief Librarian, Catalogue Department Supervisor, Head of Administration, Reference Department Supervisor, Children's Department Supervisor, Branch Co-ordinator and Fitzpatrick Branch Supervisor" (19 employees in unit) (*Having regard to the agreement of the parties*)

1955-88-R: International Union United Plant Guard Workers of America, Amalgamated Plant Guards, Local 1958 (Applicant) v. The Art Gallery of Windsor (Respondent)

Unit: "all security guards employed by the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisor, persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

1956-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Alliance Ballasts Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Cobourg, Ontario, save and except foremen, persons above the rank of foreman, office, sales, engineers and technical staff" (157 employees in unit) (*Having regard to the agreement of the parties*)

1970-88-R: Teamsters Union Local 990 (Applicant) v. O.M.L. - Northwestern Ontario Club (Respondent)

Unit: "all employees of the respondent in Thunder Bay, save and except dispatchers, those above the rank of dispatcher, office, clerical, technical and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1971-88-R: Teamsters Union, Local 990 (Applicant) v. Martin-Brower of Canada Ltd. (Respondent)

Unit: "all employees of the respondent working in and out of Thunder Bay, save and except dispatchers and those above the rank of dispatcher" (3 employees in unit) (*Having regard to the agreement of the parties*)

1973-88-R: Service Employees Union, Local 210 Affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Windsor Raceway Inc. (Respondent)

Unit #1: "all employees of the respondent in the Janitorial Department in the City of Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of November 16, 1988" (22 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Janitorial Department in the City of Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of November 16, 1988" (6 employees in unit) (*Having regard to the agreement of the parties*)

1976-88-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Nick Livingstone Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and

electricians' apprentices in the employ of the respondent in all other sectors in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1977-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Special Foundations Systems Co. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1983-88-R: Ontario Nurses' Association (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario (Respondent) v. Group of Employees (Objectors)

Unit #1: "all lay registered and graduate nurses employed in a nursing capacity by the respondent at its Hospital in the City of Sarnia, Ontario, save and except head nurses, persons above the rank of head nurse, I.V. Co-ordinator, and persons regularly employed for not more than 24 hours per week" (124 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all lay registered and graduate nurses employed in a nursing capacity regularly employed for not more than 24 hours per week by the respondent at its Hospital in the City of Sarnia, Ontario, save and except head nurses, persons above the rank of head nurse and I.V. Co-ordinator" (118 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1985-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lafarge Canada Inc. (Respondent)

Unit: "all employees of the respondent working in and out of its permanent concrete division, quarry operation, in the Township of Cornwall, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

1989-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cobra Drain & Development Corp. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1991-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. G.R.W. Industries '1985' Ltd. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office, technical and sales staff, and students employed during the school vacation period" (29 employees in unit) (*Having regard to the agreement of the parties*)

2010-88-R: Service Employees' Union, Local 183 (Applicant) v. The Belleville Plaza, A Partnership Under the Laws of the Province of Ontario (Respondent)

Unit: "all employees of the respondent in the City of Belleville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and

students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

2017-88-R: IWA - Canada (Applicant) v. Bulk-Lift Canada Ltd. (Respondent)

Unit: “all employees of the respondent at its Fib-Pak Division in the Town of Hawkesbury, save and except foremen, foreladies, persons above the rank of foreman, forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (28 employees in unit) (*Having regard to the agreement of the parties*)

2028-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Brant County Board of Education (Respondent)

Unit: “all employees of the respondent in Brant County employed as psychologists, behaviour assistants, and attendance counsellors, save and except supervisors, persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

2052-88-R: Ontario Public Service Employees Union (Applicant) v. Peterborough Youth Services (Respondent)

Unit: “all employees of the respondent in the City of Peterborough, save and except supervisors, persons above the rank of supervisor”(11 employees in unit) (*Having regard to the agreement of the parties*)

2053-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Reveam Contracting Company Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2058-88-R: Service Employees’ International Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. Community Lifecare Inc. o/a Pine Villa (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, administrative assistant, office and clerical staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

2066-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Parkmount Excavating (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2175-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Timbel Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and

Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1194-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dowty Canada Electronics Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, and office and sales staff” (38 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	27
Number of persons who cast ballots	27
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	25
Number of segregated ballots cast by persons whose names appear on voters’ list	2
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	11
Ballots segregated and not counted	2

1734-88-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hurdman Bros. Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Gloucester, save and except supervisors and dispatcher, persons above the rank of supervisor and dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week” (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5

1754-88-R: Ontario Public Service Employees Union (Applicant) v. Georgetown & District Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: “all paramedical employees of the respondent in Georgetown regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons in bargaining units for which any trade union held bargaining rights as of October 20, 1988, being the date of application” (26 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

1363-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Cuddy Food Products Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 175 and United Food & Commercial Workers International Union, AFL:CIO:CLC (Intervenors) (400 employees in unit)

0124-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Purigan Masonry Ltd. (Respondent) (5 employees in unit)

1813-88-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America - UAW (Applicant) v. Cargill Grain Company Ltd. (Respondent) v. Group of Employees (Objectors) (28 employees in unit)

1873-88-R: United Steelworkers of America (Applicant) v. Collins & Aikman (Ontario) Ltd. (Respondent) (141 employees in unit)

1893-88-R: Ontario Nurses' Association (Applicant) v. Huron Lodge Division of Algoma District Social & Family Services Board (Respondent) v. Canadian Union of Public Employees (Intervener) (2 employees in unit)

1896-88-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Victoria Hospital Corporation (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener) (28 employees in unit)

1944-88-R: Canadian Guards Association (Applicant) v. Wackenhut of Canada Ltd. (Respondent) (80 employees in unit)

2047-88-R, 2048-88-R, 2049-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Aspen Aluminium Ltd. (Respondent) (36 employees in unit)

2060-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. G. Macera Contracting Ltd. (Respondent) (7 employees in unit)

2085-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Masters Aluminium Eavestroughing (Respondent) (5 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1647-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acmetrack Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (100 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	111
Number of persons who cast ballots	107
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	85

1719-88-R: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Inverpower Controls Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Burlington, save and except supervisors, persons above the rank of supervisor, professional engineers, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (60 employees in unit)

Number of names of persons on list as originally prepared by employer	59
Number of persons who cast ballots	56
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	27

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1350-88-R: Teamsters Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 507822 Ontario Inc. c.o.b. as Tilbury Concrete (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Tilbury, save and except supervisor, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4

1608-88-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. T.R.P. Ready-Mix Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent working in the Counties of Ottawa-Carleton, Russell, Prescott, Glengarry, Stormont and Dundas, save and except foremen, persons above the rank of foreman, office and sales staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	9
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	8
Ballots segregated and not counted	1

1700-88-R: Graphic Communications International Union, Local 500M (Applicant) v. SQS Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and production co-ordinators” (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	11
Ballots segregated and not counted	1

1785-88-R: United Textile Workers of America (Applicant) v. Frontier Refractories Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Welland, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6

1800-88-R: United Steelworkers of America (Applicant) v. Gina Management Ltd., Rainbow Concrete Industries Ltd., Skead Transport Inc. and Skead Transport Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the District of Sudbury, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (91 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	87
Number of persons who cast ballots	83
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	71
Number of segregated ballots cast by persons whose names do not appear on voters' list	12
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	50
Ballots segregated and not counted	12

Applications for Certification Withdrawn

3269-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Thiele Drywall (1981) Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 675 (Intervener)

3444-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America, UAW (Applicant) v. Service Employees' Union, Chatham Area Office (Respondent)

1055-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Anaheim Group, Anaheim Properties (Ontario) Ltd., Anaheim Properties Ltd., Anaheim Management Ltd., Granville Contractors Ltd. Group 10 Contractors (Respondents)

1105-88-R: Labourers' International Union of North America, Local 527 (Applicant) v. Peter Kiewit Sons Co. Ltd. Contractors (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

1302-88-R: Toronto Typographical Union, Local 91 (Applicant) v. Customs Cheques of Canada and Custom Forms of Canada (Respondents)

1592-88-R: The Civic Institute of the Professional Personnel of Ottawa-Carleton (Applicant) v. The Corporation of the City of Ottawa (Respondent)

1623-88-R: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. George Berube Construction (Respondent)

1631-88-R: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Galt Concrete - Division of Jeff Brett Enterprises Ltd. (Respondent)

1741-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bruman Leasing Ltd. (Respondent)

1826-88-R: United Food & Commercial Workers International Union, Local 175, AFL-CIO:CLC (Applicant) v. National Systems of Baking Ltd. (Respondent) v. Group of Employees (Objectors) Unit #1 Withdrawn

1961-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Mediacom Inc. (Respondent) v. Group of Employees (Objectors)

2116-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Special Foundations Systems Co. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1986-88-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Canadian Corporate Management Co. Ltd. (Respondent) (*Withdrawn*)

2044-88-FC: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Applicant) v. Unicell Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0320-88-R: United Food & Commercial Workers International Union, Local 530P (Applicant) v. Maple Leaf Mills Ltd., Livingston Distribution Centres Inc., C.W. Henderson Cartage Ltd. (Respondents) v. International Woodworkers of America-Canada (Intervener #1) v. Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #2) (*Dismissed*)

1265-88-R: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Metalbestos Erectors Ltd. Continental Cladding (Sudbury) Ltd. (Respondent) (*Withdrawn*)

1402-88-R: United Electrical, Radio & Machine workers of Canada (UE) (Applicant) v. Northern Transformer Inc. and Concord Prefabricating Co. Ltd. (Respondents) (*Dismissed*)

1709-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Heron Mechanical Ltd. and P.M.H. Plumbing Services Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

0147-88-R: The Association of Allied Health professional: Ontario (Applicant) v. The Religious Hospitalers of Saint Joseph of the Hotel Dieu of Kingston; Brockville General Hospital (Respondent) (*Withdrawn*)

0320-88-R: United Food & Commercial Workers International Union, Local 530P (Applicant) v. Maple Leaf Mills Ltd., Livingston Distribution Centres Inc., C.W. Henderson Cartage Ltd. (Respondents) v. International Woodworkers of America-Canada (Intervener #1) v. Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #2) (*Dismissed*)

0325-88-R: Energy & Chemical Workers Union (Applicant) v. Ferro Industrial Products Ltd. (Respondent) (*Withdrawn*)

1265-88-R: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Metalbestos Erectors Ltd. Continental Cladding (Sudbury) Ltd. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1224-87-R: United Food & Commercial Workers International Union, Local 382W (Applicant) v. Bay Beverages Ltd. (Respondent) (*Granted*)

1489-87-R: United Food & Commercial Workers International Union, Local 278W (Applicant) v. United Cooperatives of Ontario (Kingsville) (Respondent) (*Granted*)

1490-87-R: United Food & Commercial Workers International Union, Local 329W (Applicant) v. Manis Metal Manufacturing Ltd. (Respondent) (*Granted*)

1491-87-R: United Food & Commercial Workers International Union, Local 329W (Applicant) v. Jaslow Glass Industries Ltd. (Respondent) (*Granted*)

1500-87-R: United Food & Commercial Workers International Union, Local 501W (Applicant) v. Cathcart Freight Lines (Peterborough) Ltd. (Respondent) (*Granted*)

1512-87-R: United Food & Commercial Workers International, Local 281W (Applicant) v. Canada Malting Co. Ltd. (Respondent) (*Granted*)

1513-87-R: United Food & Commercial Workers International Union, Local 389W (Applicant) v. Highland Beverages Ltd. (Respondent) (*Granted*)

1519-87-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. Ontario Liquor Boards Employees' Union (Respondent) (*Granted*)

1529-87-R: United Food & Commercial Workers International Union, Local 389W (Applicant) v. Highland Beverages Ltd. (Respondent) (*Granted*)

1533-87-R: United Food & Commercial Workers International Union, Local 391W (Applicant) v. Coca-Cola Foods (Minute Maid) (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1914-87-R: Katherine Edwards (Applicant) v. Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261 (Respondent) v. Talisman Motor Inn (Intervener) v. Group of Employees (Objectors) (*Dismissed*) (10 employees in unit)

0847-88-R: Raphael Lewis, Walter Meresanits, Howard Bogues (Applicant) v. Shopmen's Local Union 834 of the International Association of Bridge, Structural & Ornamental Ironworkers (Respondent) v. Connie Steel Products Ltd. (Intervener) (*Granted*)

Unit: "all employees of the Connie Steel Products Limited at its shop, or shops in Vaughan Township, Ontario, save and except foremen, persons above the rank of foreman, office, clerical staff, draftsmen, watchmen, guards, persons engaged in major extensions or major remodelling of Connie Steel Products Limited's premises, and persons engaged in field erection and/or construction work" (16 employees in unit)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	11

0869-88-R: Sheila Warren, Maureen Wall (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. E.M.D. Hardware Ltd. (Intervener) (*Granted*)

Unit: "all employees of E.M.D. Hardware Ltd. in the Town of Dryden, save and except manager and persons above the rank of manager" (11 employees in unit)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	8

1031-88-R: Maureen Thompson (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Respondent) v. Kenmar Doors Ltd. (Intervener) (*Dismissed*) (31 employees in unit)

1124-88-R: Bruce Summers (Applicant) v. Teamsters Union Local 938 (Respondent) v. Byers Bush Ltd. (Intervener) (*Dismissed*) (32 employees in unit)

1423-88-R: Claudia McKinnon (Applicant) v. National Union, Canadian Automobile, Aerospace & Agricultural Implement Workers of Canada (CAW) and its Local 240 (Respondent) v. Hull-Thomson Ltd. (Intervener) (*Granted*)

Unit: “all office and clerical employees of Hull-Thomson Limited at Windsor, Ontario, save and except managers, persons above the rank of manager, sales staff, secretary to the President and employees in bargaining units for which any trade union held bargaining rights as of January 9, 1986” (2 employees in unit)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

1556-88-R: Employees of Canron Inc. Plastics Division of Etobicoke (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, formerly the International Molders & Allied Workers Union (Respondent) v. Canron Inc. Plastics Division (Intervener) v. Group of Employees (Objectors) (*Dismissed*) (28 employees in unit)

1670-88-R: Irene Cohen (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Respondent) v. Egan Visual Inc. (Intervener) v. Group of Employees (Objectors) (*Granted*)

Unit: “all employees of Egan Visual Inc. employed at its plant at Woodbridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (73 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	67
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	56

1839-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Labourers' Ontario Provincial District Council (Respondent) (*Withdrawn*)

1850-88-R: Terry MacLeod (Applicant) v. United Steelworkers of America (Respondent) v. A.W.L. Steego, A Division of McKerlie-Millen Inc. (Intervener) (*Withdrawn*)

1894-88-R: Lorne Day (Applicant) v. Triple A Union of Drivers & General Workers (Respondent) (*Withdrawn*)

1914-87-R: Katherine Edwards (Applicant) v. Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261 (Respondent) v. Talisman Motor Inn (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

**APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE
(CONSTRUCTION INDUSTRY)**

1958-88-U: Nicholls-Radtke Ltd. (Applicant) v. International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local 353, Joe Fashion, Don Hirlehey, Bob Gill, Ray Putsey, Osmo Maki, Vince Galati and Gary Bain (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2139-86-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Hayloft Steakhouse Ltd. (Respondent) (*Withdrawn*)

2544-86-U: Elizabeth Balanyk (Complainant) v. Ontario Nurses' Association (Respondent) v. Greater Niagara General Hospital (Intervener) (*Granted*)

3504-86-U: Elizabeth Balanyk (Complainant) v. Greater Niagara General Hospital, Ontario Nurses' Association, Patricia Stuart, Marianne Orcutt, Al Weier and Liz Woods (Respondents) (*Granted*)

0681-87-U: Masonry Contractors' Association of Toronto Inc. (Complainant) v. The Bricklayers, Masons Independent Union of Canada, Local 1 (Respondent) (*Withdrawn*)

1807-87-U: United Plant Guard Workers of America, Local 1962 (Complainant) v. Chrysler (Canada) Corp. (Respondent) (*Withdrawn*)

1928-87-U: John Henson and 25 others (Complainants) v. United Food & Commercial Workers International Union, AFL:CIO:CLC, United Food & Commercial Workers International Union, Local 175 and Cuddy Food Products Ltd. (Respondents) v. Deb Johnston and others (Interveners) (*Granted*)

1969-87-U: Roland Fillion (Complainant) v. VS Services Ltd. and Canadian Union of Public Employees, Local 1065 (Respondents) (*Dismissed*)

2966-87-U: Labourers' International Union of North America, Ontario Provincial District Council and L.I.U.N.A., Local 506 (Complainants) v. Dominion Construction Company Ltd. (Respondent) (*Withdrawn*)

3187-87-U: United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Kenmar Doors Ltd. and Kenneth Collins (Respondent) (*Dismissed*)

3301-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 and Labourers' International Union of North America, Local 506 (Complainants) v. Tracs Construction Ltd. (Respondent) (*Withdrawn*)

3530-87-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America (Complainant) v. Kuhlman Plastics of Canada Ltd. (Respondent) (*Granted*)

0344-88-U: Lumber & Sawmill Workers' Union, Local 2995 (Complainant) v. Levesque Lumber (Hearst) Ltd. (Respondent) (*Withdrawn*)

0358-88-U: Donald George Bilby (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

0570-88-U: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Bronson Bakery Ltd. (Respondent) (*Withdrawn*)

0681-88-U: Ontario Public Service Employees Union (Complainant) v. Canadian Medical Laboratories Ltd. (Respondent) (*Granted*)

0701-88-U: Kenneth Edward Ingrei (Complainant) v. Amalgamated Transit Union, Local 741 (Respondent) v. London Transit Commission (Intervener) (*Dismissed*)

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1288-88-U: United Electrical, Radio & Machine Workers of Canada (UE) (Complainant) v. Square D Canada Electrical Equipment Inc. (Respondent) (*Withdrawn*)

1303-88-U: Toronto Typographical Union, Local 91 (Complainant) v. Customs Cheques of Canada & Custom Forms of Canada (Respondents) (*Withdrawn*)

1390-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Columbia Lumber Mills Ltd. (Warehouse Mill Division) (Respondent) (*Withdrawn*)

1406-88-U: Canadian Union of Public Employees, Local 3303 (Complainant) v. St. Jacques Nursing Home (Respondent) (*Withdrawn*)

1419-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Columbia Lumber Mills Ltd. (Warehouse Mill Division) (Respondent) (*Withdrawn*)

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1453-88-U: Sandra Bradshaw, Keith Bradshaw, Joe Bradshaw (Complainants) v. United Food & Commercial Workers International Union, Local 139 (Respondent) (*Withdrawn*)

1524-88-U: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. Kitchener-Waterloo Hospital (Respondent) (*Withdrawn*)

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1656-88-U: United Food & Commercial Workers International Union, Local 617 (Complainant) v. Bradshaw Stradwick 1979 Inc. (Respondent) (*Withdrawn*)

1668-88-U: Allan Curtis Leisle (Complainant) v. Graphic Communications International Union, Local 466 (Respondent) v. DRG Packaging (Intervener) (*Withdrawn*)

1679-88-U: Retail, Wholesale & Department Store Union (Complainant) v. Allan Candy Ltd. (Respondent) (*Withdrawn*)

1684-88-U: Susan Rhymer (Complainant) v. Ontario Public Service Employees Union, Local 442 (Respondent) (*Dismissed*)

1685-88-U: Gary Devine (Complainant) v. Ontario Taxi Union - Local 1688 - R.W.D.S.U., AFL:CIO:CLC

and The Blue Line Taxi Unit, it's Chairman Godwin Smith, and The Whole Blue Line Taxi Unit Executive (Respondent) (*Withdrawn*)

1713-88-U: Teamsters Local No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Galt Concrete - Division of Jeff Brett Enterprises Ltd. and Roger Fenton (Respondents) (*Withdrawn*)

1753-88-U: Graphic Communications International Union, Local 512-S (Complainant) v. Viskase Canada Inc. (Respondent) (*Withdrawn*)

1789-88-U: Wendell Jack and Bruce Claridge (Complainants) v. Sheet Metal Workers International Association, Local 30 (Respondent) (*Granted*)

1795-88-U: Kenneth John Berry (Complainant) v. Amalgamated Clothing & Textile Workers Union, South-Western Ontario Joint Board, Local 723T (Respondent) (*Withdrawn*)

1797-88-U: Richard A. Askey (Complainant) v. Teamsters Union, Local 938 and Ray Bartolotti (Respondent) (*Withdrawn*)

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1824-88-U: Kenneth Sidney Gambriell (Complainant) v. Ajax Precision Mfg. Ltd. (Respondent) (*Withdrawn*)

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1855-88-U: Mr. Hooshmand Baripour (Complainant) v. Diamond Taxi Unit & Executive, Mr. Harry Ghadban R.W.D.S.U. Business Agent & R.W.D.S.U., Local 1688 and International and Diamond Owner President Roger Viau and Owners and Brokers Association (Respondents) (*Withdrawn*)

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1937-88-U: Panayotis Sigalas (Complainant) v. United Food & Commercial Workers, Locals 175/633 (Respondent) (*Withdrawn*)

1949-88-U: Gregory Barrett (Complainant) v. Ontario Taxi Union, Local 1688 R.W.D.S.U. & Mr. D. Jewitt (Respondent) (*Withdrawn*)

1959-88-U: Nicholls-Radtke Ltd. (Complainant) v. International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local 353, Joe Fashion, Don Hirlehey, Bob Gill, Ray Putsey, Osmo Maki, Vince Galati and Gary Bain (Respondents) (*Withdrawn*)

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0648-88-M: Ontario Public Service Employees' Union (Applicant) v. Fleetwood Ambulance Services (Respondent) (*Granted*)

0810-88-M: Ontario Nurses' Association Staff Union (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

1085-88-M: Ottawa Newspaper Guild (Applicant) v. The Ottawa Citizen (Respondent) (*Granted*)

1203-88-M: Amalgamated Clothing & Textile Workers Union (Applicant) v. Levis Strauss & Co. (Canada) Inc. (Respondent) (*Granted*)

1322-88-M: Perley Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

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0315-86-M: Quality Control Council of Canada (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent) (*Dismissed*)

0748-87-G: Masonry Contractors Association of Toronto Inc. (Applicant) v. The Bricklayers, Masons Independent Union of Canada, Local 1 (Respondent) (*Withdrawn*)

1017-87-G: The Mechanical Contractors Association of Hamilton (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Respondent) (*Dismissed*)

3343-87-G: Ontario Sheet Metal Workers' & Roofers' Conference (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Granted*)

0615-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. O'Connor Mechanical Ltd. (Respondent) (*Withdrawn*)

0846-88-G: Sheet Metal Workers' International Association, Local 392 (Applicant) v. Carter Day Industries (Canada) Ltd. (Respondent) (*Granted*)

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1242-88-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Conrad Heating Co. (Respondent) (*Granted*)

1353-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Moon Demolition Ltd. (Respondent) (*Granted*)

1446-88-G: Nicholls-Radtke Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and Bill Weatherup (Respondents) (*Granted*)

1570-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Granted*)

1744-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. King Paving & Materials Ltd. (Respondent) (*Withdrawn*)

1786-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. R.G. Nicol Construction Ltd. (Respondent) (*Withdrawn*)

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1922-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Frank Plastina Investments Ltd. and Ontario Concrete & Drain Contractors' Association (Respondents) (*Granted*)

2008-88-G, 2009-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

2029-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Duet Interior Systems, Helm Acoustical Drywall Co. Ltd., and Helm Interiors (Respondents) (*Granted*)

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2035-88-G: Labourers' International Union of North America (Applicant) v. Zoila Carpentry (Respondent) (*Granted*)

2036-88-G: Labourers' International Union of North America (Applicant) v. Fri-Con Construction Ltd. (Respondent) (*Withdrawn*)

2038-88-G: Labourers' International Union of North America (Applicant) v. Toma Construction Ltd. (Respondent) (*Withdrawn*)

2073-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Steel Up & Related Companies (Respondent) (*Withdrawn*)

2075-88-G; 2076-88-G; 2077-88-G; 2078-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

2081-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Rod & Ready Mechanical Contractors (Respondent) (*Withdrawn*)

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2109-88-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Link Steel & Mechanical Ltd. (Respondent) (*Withdrawn*)

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2144-88-G: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Local 7 Canada (Applicant) v. Universal Ceramics Ltd. (Respondent) (*Granted*)

2147-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

2148-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Mississauga Construction (Respondent) (*Dismissed*)

2149-88-G: Labourers' International Union of North America, Locals 506 & 625 (Applicant) v. A. P. Green Refractories Ltd. (Respondent) (*Withdrawn*)

2177-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. I.P.C.F. Properties Inc. (Respondent) (*Granted*)

2178-88-G: Labourers' International Union of North America, Local 493 (Applicant) v. Industrial Piping Construction (Respondent) (*Withdrawn*)

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1194-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dowty Canada Electronics Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1388-88-R: International Brotherhood of Painters & Allied Trades, Local 1792 Glaziers (Applicant) v. Whyte & Braniff Glass Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1389-88-R: Scott Campbell (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondent) v. Collingwood Plumbing Ltd. (Intervener) (*Dismissed*)

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*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

February 1989



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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NOTICE

The following forms are now available for use. They can be obtained by contacting the Registrar's Office.

1. *Successor Rights (Crown Transfers) Act*

- Form: SRA/1 – Application Under Section 4 of the Act
SRA/4 – Reply to an Application under Section 4 of the Act
SRA/5 – Intervention in an Application Under Section 4 of the Act

2. *Occupational Health and Safety Act*

- Form: OH/1 – Complaint Under Section 24 of the Act
OH/2 – Reply to Complaint Under Section 24 of the Act
OH/3 – Intervention in Complaint under Section 24 of the Act

3. *Colleges Collective Bargaining Act*

- Form: CCBA/1 – Complaint Under Section 77 of the Act
CCBA/2 – Reply to Complaint Under Section 77 of the Act
CCBA/3 – Intervention in Complaint Under Section 77 of the Act

4. *Environmental Protection Act*

- Form: EPA/1 – Complaint Under Section 134(b) of the Act
EPA/2 – Reply to Complaint Under Section 134(b) of the Act
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appoint an officer to inquire into the voluntariness of the membership evidence or order a vote because the employees do not know English - Respondent not making any allegations of wrongdoing nor asserting that any particular individual did not know what he was signing - None of the employees coming forward to oppose application - Board issuing a certificate without officer appointment or vote

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WOODSTOCK & DISTRICT ASSOCIATION FOR THE MENTALLY RETARDED; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., A.F.L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES	227
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HUMPTY DUMPTY FOODS LIMITED; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTIONERY WORKERS' UNION, LOCAL 461 OF THE R.W.D.S.U., AFL:CIO:CLC:	147
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Certification - Trade Union Status - Employer recognizing the applicant as the representative body for a group of employees for a number of years - Whether the applicant is a trade union - Whether employer support so as to prohibit Board from certifying applicant - Board rejecting proposition that an organization which includes managerial persons in its membership cannot be a trade union - Not critical that an applicant establish a technically satisfactory constitutional continuum if it has been in existence a long time - Board discussing ways

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a trade union may be brought into existence - Applicant found to be a trade union -Certification of applicant not prohibited by s.13

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES, TOM STEVENS, C.A. STEVENSON, AND MICHELLE MORRISSEY-O'RYAN AND GEORGE ORR ON BEHALF OF CERTAIN OBJECTING EMPLOYEES.....

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Collective Agreement - Certification - Construction Industry -Intervenors arguing that certain persons employed by the respondents were hired contrary to the collective agreement and therefore should not be in the unit for purposes of the count - Board not applying *April Waterproofing* principle - Intervenors made no reasonable effort to make sure that the respondents had complied with the hiring provisions in the agreement

AERO BLOCK AND PRECAST LTD., KAMET ENTERPRISES LTD. AND 541190 ONTARIO INC.; RE C.J.A.; RE THE FORM WORK COUNCIL OF ONTARIO; RE L.I.U.N.A., LOCAL 493.....

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Collective Agreement - Construction Industry - Employer - Judicial Review - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on "gentleman's agreement" as constituting a bar to the union's contracting out grievance - Board declaring "gentleman's agreement" null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, *inter alia*, the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in determining that the Windsor Board of Education was acting as an "employer" in these circumstances -Judicial review dismissed by Divisional Court

WINDSOR, THE BOARD OF EDUCATION FOR THE CITY OF; RE U.A., LOCAL 552 AND ONTARIO LABOUR RELATIONS BOARD.....

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Conciliation - Practice and Procedure - Reference - Trade Union -Trade Union Status - Union Successor Status - Objecting employees permitted to participate in Ministerial reference - Two union locals taking steps to merge - Whether "predecessor" local still in existence so as to be entitled to request a conciliation officer - Board discussing trade union reorganizations - Board finding that union local still existed as a trade union at the time it requested a conciliation officer

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Constitutional Law - Certification - Construction Industry -Respondent an engineering consulting company which provides vibration monitoring and assessment services - Bell Canada constructing a fiberoptic telecommunications cable - Respondent hired by construction company building cable to protect a nearby natural gas pipeline - Respondent's argument that since the work was in relation to a pipeline the application was outside provincial jurisdiction dismissed - Board finding this to be construction work and respondent's employees to be construction labourers

VIBRATION ASSESSMENT LIMITED; RE L.I.U.N.A., LOCAL 607

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Certification - Bargaining Unit - Construction Industry - Whether surveyors should be included in operating engineers bargaining unit -Board always describes ICI sector bargaining units in a manner consistent with the designation order - Operating engineers designation order including surveyors - Board jurisprudence indicating that the applicant has been granted

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KRAFT CONSTRUCTION COMPANY (1978) LTD.; RE I.U.O.E., LOCAL 793 169

Construction Industry - Certification - Collective Agreement -Intervenors arguing that certain persons employed by the respondents were hired contrary to the collective agreement and therefore should not be in the unit for purposes of the count - Board not applying *April Waterproofing* principle - Intervenors made no reasonable effort to make sure that the respondents had complied with the hiring provisions in the agreement

AERO BLOCK AND PRECAST LTD., KAMET ENTERPRISES LTD. AND 541190 ONTARIO INC.; RE C.J.A.; RE THE FORM WORK COUNCIL OF ONTARIO; RE L.I.U.N.A., LOCAL 493 93

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Employer - Collective Agreement - Construction Industry - Judicial Review - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on "gentleman's agreement" as constituting a bar to the union's contracting out grievance - Board declaring "gentleman's agreement" null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, *inter alia*, the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in determining that the Windsor Board of Education was acting as an "employer" in these circumstances - Judicial review dismissed by Divisional Court

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METROPOLITAN LIFE INSURANCE COMPANY; RE I.U.O.E., LOCAL 796; RE ALLEN MAINTENANCE LTD. 175

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FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128 128

Evidence - Certification - Petition - Board discussing the effect of an earlier petition on the voluntariness of a later petition - Circumstances surrounding the prior circulation of a petition are

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FRAM CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES 133

Evidence - Certification - Practice and Procedure - Related Employer -Board determining procedure for dealing with certification and related employer applications involving ten respondents - Respondent arguing that Board is without jurisdiction to adjudicate the related employer application until it has determined the applicant's right to be certified for any or all respondents - Respondents argument that it is a prerequisite to a s.1(4) declaration that there exist some bargaining rights dismissed - Board determining that related employer application should be dealt with first - Applicant's request that certain documents be produced in advance of hearing granted - Board also encouraging parties to voluntarily produce in advance documents on which they intend to rely

ATWAY TRANSPORT INC.; RE I.W.A.; RE TAIGA TRUCKING (ONTARIO) 1980 INC.; RE MENROY TRUCKING INC.; RE DEMERS & DARGY TRANSPORT INC.; RE GOSSELIN TRUCKING; RE PAUL GAGNON TRUCKING; RE J. BERNARD TRUCKING; RE CONTRACTORS CLEANUP SERVICES LIMITED; RE L.I.U.N.A., LOCAL 706; RE KOPKA TRANSPORT INC.; RE PARAMOUNT TRANSPORTATION LIMITED 101

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Practice and Procedure - Adjournment - Evidence - Jurisdictional Dispute - Parties - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervenor status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128 128

Practice and Procedure - Certification - Ballot box ordered sealed following submissions from the union that it had not received notice of the hearing where the voluntariness of the petition had been determined - Staff of union on strike and picket line in place when notice of hearing left at union office - Union official not discovering notice until after the hearing - Board declining to reconvene hearing on the issue of the voluntariness of the petition - Failure to read the notice until after the hearing not beyond the control of the union - Board ordering ballots counted

WOODSTOCK & DISTRICT ASSOCIATION FOR THE MENTALLY RETARDED; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., A.F.L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES 227

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ATWAY TRANSPORT INC.; RE I.W.A.; RE TAIGA TRUCKING (ONTARIO) 1980 INC.; RE MENROY TRUCKING INC.; RE DEMERS & DARGY TRANSPORT INC.; RE GOSSELIN TRUCKING; RE PAUL GAGNON TRUCKING; RE J. BERNARD TRUCKING; RE CONTRACTORS CLEANUP SERVICES LIMITED; RE L.I.U.N.A., LOCAL 706; RE KOPKA TRANSPORT INC.; RE PARAMOUNT TRANSPORTATION LIMITED 101

Practice and Procedure - Certification - Membership Evidence - Respondent asking Board to appoint an officer to inquire into the voluntariness of the membership evidence or order a vote because the employees do not know English - Respondent not making any allegations of wrongdoing nor asserting that any particular individual did not know what he was signing - None of the employees coming forward to oppose application - Board issuing a certificate without officer appointment or vote

ADMIRAL LINEN SUPPLY LIMITED; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES, INTERNATIONAL UNION, LOCAL 351 90

Practice and Procedure - Certification - Pre-Hearing Vote - Trade Union Status - Applicant for

certification is expected to correctly name itself - Statements of applicant's affiliations do not belong in the title portion of the certification application - Benefit of s.105 is unavailable to the applicant unless it can show that it is a continuation of one of the organizations previously found by the Board to be a trade union -Ballot box sealed - Applicant will be required to show it is a trade union

BUTCHER ENGINEERING ENTERPRISES LIMITED, THE; RE TEAMSTERS,
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Practice and Procedure - Certification - Trade Union Status -Respondent alleging that applicant had not proven its trade union status -Applicant arguing it was the same organization that had previously been found to be a trade union - Where any deviation in applicant's name from name Board has in its files a hearing will result - In order to benefit from presumption in s.105 an applicant must style itself in exactly the same fashion as the organization which has already been granted "status" - Board satisfied after hearing evidence that applicant could benefit from previous trade union determination - Argument that employees would be misled as to who was the true applicant dismissed

HUMPTY DUMPTY FOODS LIMITED; RE MILK AND BREAD DRIVERS, DAIRY
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Practice and Procedure - Conciliation - Reference - Trade Union -Trade Union Status - Union Successor Status - Objecting employees permitted to participate in Ministerial reference - Two union locals taking steps to merge - Whether "predecessor" local still in existence so as to be entitled to request a conciliation officer - Board discussing trade union reorganizations - Board finding that union local still existed as a trade union at the time it requested a conciliation officer

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Practice and Procedure - Damages - Parties - Reconsideration - Unfair Labour Practice - Complainants arguing that Board erred in awarding damages only to the complainants - Argument that damages should be afforded to all employees affected by the breach of the Act dismissed - A complainant must have the authority to represent the grievors' interests - Complainants gave no indication during the proceedings that they were authorized to make a complaint on behalf of any other employees -Reconsideration application dismissed

CUDDY FOOD PRODUCTS LTD.; RE R.W.D.S.U., AFL:CIO:CLC;; RE U.F.C.W.,
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KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206 149

1931-88-R International Brotherhood of Electrical Workers', Local 353, Applicant v. Action Electrical Ltd., Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Employees filing documents with the Board requesting a representation vote by secret ballot - Whether the "petitions" filed are evidence of objection by the employees to the certification and, if so, whether they are voluntary expressions of desire - Working foreman who circulated the petitions testifying that the petitions were drafted so that there would be a secret ballot vote - Board finding that the preamble was not a clear statement in opposition to the union - A request for a secret ballot vote is not tantamount to evidence of objection - Oral evidence supporting that conclusion - Documents not voluntary in any event - Certificates issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Lear* and *N. A. Wilson*.

APPEARANCES: *Craig Flood* for the applicant; *Robin B. Cumine* for the respondent; *Stephen R. Jowett* for the objecting employees.

DECISION OF THE BOARD; February 9, 1989

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (the Act) and is an affiliated bargaining agent of the designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers' and the IBEW Construction Council of Ontario.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional section of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights of such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. Having regard to the agreement of the parties the Board further finds that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham save and except non-working foremen and persons above the

rank of non-working foreman constitute the unit of employees of the respondent appropriate for collective bargaining.

5. Filed with the Board were eighteen undated typewritten documents (for present purposes referred to as "petitions") signed by eighteen persons purporting to be employees of the respondent. The preamble of the petitions filed is as follows:

I, the undersigned, as an employee of Action Electrical Ltd. request from the Ontario Labour Relations Board a representation vote by secret ballot. I make this request without prejudice to anyone in the employment of Action Electrical Ltd.

The number of persons who signed these petitions who had previously signed membership cards in support of the applicant was sufficiently high that, (a) if the petitions were found to be evidence "of objection by employees to certification of [the] trade union or a signification by employees that they no longer wished to be represented by a trade union," and (b) such petitions were found to be voluntary, they would raise sufficient doubt concerning the continued support for certification of the applicant that the Board would generally exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the fact that more than fifty-five percent of the employees of the bargaining unit were members of the applicant at the relevant time.

6. The two issues raised in this application therefore are whether the petitions filed are evidence of objection by the employees to the certification of the applicant or signification by the employees that they no longer wished to be represented by the applicant and, if so, whether these statements are a voluntary expression of the true wishes of the employees. At the commencement of the hearing we ruled that we would hear the evidence and representations of the parties in respect of both of these issues at the same time, and that we would not deal with the first issue as a preliminary matter. In so doing we were mindful of the Divisional Court's admonishments in *Re. Fisher et al* and *Hotels, Clubs, Restaurants, Tavern Employees Union, Local 261 et al*, [1980] 28 O.R. (2d) 462. In *Re. Fisher* the Court found that the Board's refusal to entertain oral evidence to "explain or clarify" a written document of objection amounted to a failure to give the objectors a fair hearing and was a denial of natural justice and an unreasonable interpretation of the Board's constituent legislation. "Rule 73 permits the Board to accept oral evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union" to "identify and substantiate" the written evidence filed. As *viva voce* evidence could arguably "identify and substantiate" the petitions (including perhaps the intent and purpose of the petition or the meaning sought to be given to the preamble of the petitions by the employees), and in view of the Court's comments in *Re. Fisher*, we proceeded to hear the evidence.

7. Only one person testified as to the origination and circulation of the petitions. That was Mr. Steven Jowett, a journeyman electrician who, at the relevant time was employed as working foreman by the respondent. Mr. Jowett's duties and responsibilities were those typically exercised by working foremen in the construction industry. As the senior person on site, he has the direction and control of the electricians and electricians' apprentices on the job site at which he is foreman, but typically spends a significant portion of his own time "on the tools" performing bargaining unit work. As working foreman, Mr. Jowett assigns the work on a day to day basis, checks the employees' work for quality and evaluates the work of probationary employees, reprimands employees in case of unsatisfactory conduct, careless work, lateness or absenteeism (although he has never formally disciplined or suspended any employee), grants time-off, records employees' times, orders minor supply-items needed on the day to day basis and distributes pay-cheques. Mr. Jowett does not however, have responsibilities for hiring or firing employees although he did, on at least one occasion, advise his superior that he did not want a particular employee on his job site. As is gen-

erally the case with working foremen in the construction industry, if the applicant is certified, Mr. Jowett will be a member of the bargaining unit. As the respondent employer carries on business at a number of different sites, the respondent employs a number of working foremen to run the jobs at these various sites. Mr. Jowett's duties and responsibilities are typical of all of the respondent's working foremen although, according to Mr. Jowett, depending on the size of the job some foremen may spend less time "on the tools" and more time directing and supervising the work and the employees. There are no other managerial employees at the job site and the working foreman is normally the first and only level of management at the site.

8. Mr. Jowett was the primary originator and circulator of the petitions. Mr. Jowett knew of the union's organizing drive, and from several employees had received indications that approximately 75 to 80 percent of the employees had signed union membership cards. Mr. Jowett was of the opinion that some employees might have signed such cards without knowing all of the facts or being fully informed. He was concerned that the choice employees were making about whether to join a union or not to join the union was an uninformed choice. When he read the green sheets, and accompanying notice to employees (which indicate that if the union had membership support of fifty-five percent of the employees, normally the trade union would be automatically certified without a vote,) Mr. Jowett determined to do something about the union's application.

9. From the notice to employees, Mr. Jowett learned that if he obtained sufficient signatures on a petition there would be a secret ballot vote. Mr. Jowett desired to have a secret ballot vote so that all the employees would have an opportunity to voice their opinion after having had some time to consider both the pros and cons of having a union represent them. Mr. Jowett therefore decided to draft and circulate a petition so that there would be a secret ballot vote.

10. On the Sunday night before he drafted the petition, Mr. Jowett spoke to Mr. Don Bunting, one of the senior management personnel of the respondent employer, and informed him that he, Mr. Jowett, was going to circulate a petition because the true picture about the effects of unionization had not been presented. Mr. Jowett initiated the telephone call to advise Mr. Bunting of his intentions and to make Mr. Bunting aware of "the fact that someone at least was making a stand." Mr. Bunting told Mr. Jowett that, although he would like to talk to Mr. Jowett about the matter, the respondent's lawyer had advised against such action. As a result, Mr. Bunting did not offer any assistance to Mr. Jowett nor did he make any comments to Mr. Jowett about what he could or could not do in respect of the petition.

11. Similarly, when on the evening of Monday, November 21, 1988, Mr. Jowett spoke with Mr. Gerald Clark, the General Manager of the respondent employer and advised Mr. Clark that he would be taking the next day off to circulate a petition, Mr. Clark did not offer any support or assistance to Mr. Jowett. Indeed, Mr. Clark advised Mr. Jowett that if he took the day off he would not be paid for that day.

12. Mr. Jowett drafted the petition on a piece of foolscap while sitting at his kitchen table at approximately 7:00 a.m. on Monday, November 21, 1988. The language used in the preamble of the petition was chosen by Mr. Jowett without assistance from any other person. No member of management was present when Mr. Jowett drafted the petition.

13. That same morning Mr. Jowett used the fax machine of the general contractor on site to fax the foolscap to Ms. Colleen Bryant, a purchasing agent at the respondent's Head Office in Mississauga. Ms. Bryant typed up the document and faxed it back to Mr. Jowett at the job site. Later that day Mr. Jowett photocopied the petition at the job site using the general contractor's photocopying machine. That same day he showed the petition to the employees working at his job site. On that day Mr. Jowett obtained the signatures of P14, P15 and P16.

14. The following day Mr Jowett travelled to Mississauga in an effort to obtain more employees' signatures. His first stop was at the employer's Head Office and "shop" at Fieldgate Drive. While at the back of the shop, Mr. Jowett explained his position to the five shop employees and subsequently obtained the signatures of P17 and P18 on the petitions. Neither Mr. Clark nor Mr. Bunting were present while Mr. Jowett spoke to the employees or obtained the signatures on the petition. Mr. Merlynn Mantik who "looks after the service truck" and "may be considered the working foreman or not" was present when Mr. Jowett addressed the employees.

15. From the Fieldgate offices, Mr. Jowett drove to two job sites located next to each other. The first job site was the Trailwood Village job site in the City of Mississauga. It is a small job site at which Les Dresner is the working foreman. In the presence of Mr. Dresner, Mr. Jowett explained to the employees why he was asking employees to sign the petitions. He subsequently obtained the signatures of P8 and P9.

16. From the Trailwood Village site, Mr. Jowett went next door to the Anaheim Towers project. This is a much larger project at which Mr. Glen Caruk is the foreman. Mr. Jowett had spoken to Mr. Caruk on the previous day and had explained to Mr. Caruk that he was circulating a petition. After his arrival at the site, Mr. Caruk took Mr. Jowett to the coffee area where the employees were gathered. In the presence of Mr. Caruk, Mr. Jowett addressed the employees and articulated his position. The Anaheim meeting lasted about twenty minutes. At the Anaheim site Mr. Jowett obtained the signatures of P10, P11, P12 and P13.

17. From the Anaheim site, Mr Jowett travelled to the job site at Fairmont Towers. Mr. Tony Morelli is the working foreman at that site. Mr. Jowett had been unsuccessful in contacting Mr. Morelli on the previous evening to advise Mr. Morelli of his proposed visit to the site. Mr. Jowett however, knows Mr. Morelli and Mr. Morelli's work habits and suspected that he would not be able to meet with Mr. Morelli or the employees on site until the lunch break. Mr. Morelli is not a person who likes to have his work day or the work day of his employees interrupted.

18. Mr. Jowett arrived at the Fairmont Tower site some time between 11:00 and 11:20 a.m. He went to the foreman's trailer and waited for Mr. Morelli. Mr. Morelli came to the trailer at approximately 11:40 a.m. Mr. Jowett explained to Mr. Morelli the purpose of his visit. The two men discussed the likelihood of a successful petition with Mr. Jowett indicating that the chances of getting a petition and a vote were probably low. Mr. Jowett advised Mr. Morelli that he wanted to speak to the employees in private. He explained to Mr. Morelli that because certain of his men perhaps held grievances against him (Mr. Morelli) he, MrJowett, felt it would be better if Mr. Morelli did not attend the meeting but rather, that Mr. Morelli remain in his trailer. Mr. Morelli did not attend Mr. Jowett's meeting with the employees. We note however that Mr. Jowett spoke to some of the employees while he was waiting for Mr. Morelli to arrive at the trailer. He also spoke to other employees during the course of his conversation with Mr. Morelli as employees would periodically interrupt his conversation with Mr. Morelli by walking into the trailer to obtain supplies. In each instance, and notwithstanding Mr. Morelli's presence, Mr. Jowett would let the employees know why he was there and that he hoped to have a meeting with them.

19. Mr. Jowett met with the Fairmont Tower's employees at the parkade level of the construction site. Mr. Jowett explained the purpose for his visit and the purpose of the petitions. At the suggestion of the employees a procedure was agreed upon whereby each employee would take one of the blank forms of the petition, go into a small room, either sign the form or not sign the form, fold it and deposit the folded form in a cardboard box. In this way none of the employees would know how other employees "voted" and support for, or opposition to, the union's application would remain secret. Mr. Jowett removed the folded sheets from the box, and when he had

returned to his car separated those petitions which had been signed from those which had not been signed. Thereafter, he took all of the signed petitions which he had obtained from the various job sites, placed them in an envelope, and delivered them to the Ontario Labour Relations Board at 400 University Avenue.

20. The preceding paragraphs explain the mechanics of the origination and circulation of the petitions. The crucial question to be answered however, is what did Mr. Jowett say and what was discussed by the employees at the various meetings when the petitions were signed. As has been indicated, Mr. Jowett decided to circulate the petition because, as he himself put it, he wanted "to get the government to call for a secret ballot vote". Mr. Jowett was of the view that employees might have been misled or "might not have gotten the full picture" when they considered the matter of union representation. He felt that if he could enlighten them, explain certain facts to the employees, get the employees to ask questions and think about the matter, then if a secret ballot vote were held, employees would be informed and would be in a better position to judge whether they wished to have the union represent them or not. Mr. Jowett felt that it was only through a secret ballot vote that the employees would be able to truly "have a voice" and "express their wishes."

21. In keeping with this purpose, at each of the meetings with the employees, Mr. Jowett spoke primarily on two themes: first, he talked to the employees about his personal belief why union representation was not necessary for the employees of the respondent, and secondly he spoke about the effect of the petition.

22. With respect to the first matter, Mr. Jowett spoke specifically about what he understood to be a ratio requirement which formed part of the "union charter" and was part of the "Labour Standard's Act" or the apprenticeship program. According to Mr. Jowett, that ratio required an employer to have three journeymen electricians for every apprentice electrician employed. Mr. Jowett pointed out to the employees that the respondent had been very lenient in applying this ratio and normally operated on a one to one ratio -- one apprentice electrician for every journeyman electrician employed. A number of apprentices questioned Mr. Jowett on this matter and inquired as to whether they would lose their jobs if the union was certified. Mr. Jowett's response to those types of questions was that if the apprentices looked around the room and generally judged the ratio of journeymen electricians to apprentices, it was readily apparent that the company would need to employ another ten journeymen electricians in order to sustain the number of apprentices employed to ensure that the three to one ratio was enforced. Mr. Jowett was of the view that if the company hired ten electricians obviously it would not need as many apprentices. Simple mathematics would dictate that "someone would have to go". Mr. Jowett also explained however, that if the employees joined the union, and the union was certified, that it would be the responsibility of the union to ensure that its members had jobs. He indicated that he felt there would still be employment for everyone but that it might not be with the respondent. Throughout all of these meetings Mr. Jowett encouraged the employees to get a better understanding of what union representation would mean to them, and urged them to get answers and speak to the union representatives about some of the concerns raised.

23. With regard to the effect of the petitions, at each of the meetings Mr. Jowett advised employees that they did not have to sign the petitions, but stated that the only way that employees could have their voice heard was to sign the petition. He explained to the employees the purpose of having a representation vote (to give everyone an opportunity to voice their opinion through a secret ballot) and "requested them to sign the petition to get the vote so that they would have time to decide which side they were on, whether they wanted a union or not." When questioned by the Board, he explained that "all I said was that they would not get their voice heard unless they

signed the petition to get a representation vote. It was only by the petition that we would get a representation vote.” In cross-examination, Mr. Jowett confirmed these various statements and also testified that he did not indicate to the employees that in signing the petition they were “revoking” union membership. In fact, his evidence in cross-examination was to the contrary. He did not speak to employees about revoking union membership because he was interested in “quite the opposite” namely, to give employees a chance to vote in secret about union representation. Finally, in response to a question as to whether he was asked by any employee if the employee was still a union member if he signed the petition, Mr. Jowett stated that “No, [I] told everyone before they signed this form that it had nothing to do with revoking membership. This was a way of expressing their views secretly.”

24. Within this factual framework we now turn to examine the applicable law. We begin with the observation that in certification proceedings, the purpose of the Board is to determine whether a majority of employees in the unit appropriate for collective bargaining wish to be represented by the applicant trade union in their relationship with their employer. There are obviously a number of methods which the Board could employ to determine whether the majority of employees wish to be represented by the trade union in this manner. One method, a method employed in various other jurisdictions in Canada, is a taking of a representation vote. Another method, and a method chosen by the Legislature and enunciated in the Act, is to view evidence of membership in a trade union as evidence of a desire by employees to have that trade union represent the employees in their relationship with the employer.

25. The Act provides that if more than fifty-five percent of the employees in the bargaining unit are members of the applicant union as of the terminal date (the date which is established pursuant to the Board’s authority under section 103(2)(j) of the Act) the Board is authorized to certify the trade union without a vote. The legislature has recognized however, that, even if more than fifty-five percent of the employees of the bargaining unit are members of an applicant trade union, there may be circumstances which raise a doubt as to whether a majority of the employees in the bargaining unit wish to be represented by the trade union in their relationship with their employer. For this reason, section 7(2) gives to the Board a discretion to direct that a representation vote be taken notwithstanding the fact that fifty-five percent of the employees in the bargaining unit were members of the trade union at the relevant time.

26. Doubt as whether employees wish to be represented by a trade union may be raised where employees file “evidence of objection by employees to certification of the trade union, or of signification by employees that they no longer wish to be represented by a trade union” if such evidence is filed in accordance with Rule 73 of the Board’s Rules of Procedure. Such evidence of objection however, does not revoke or repeal membership evidence submitted by an applicant trade union in the manner and form prescribed by section 1(1)(l) of the Act and the Board’s Rules of Procedure. In this regard, we agree with and adopt the reasoning of the Board in *The Diebold Company of Canada Ltd.*, [1976] OLRB Rep. May 237 at paragraphs 10 and 11, and *Unlimited Textures Company Ltd.*, [1984] OLRB Rep. Jan. 138 at paragraphs 15, 16 and 17.

27. In *Unlimited Textures Company Ltd.*, the Board stated:

17. If a petition is shown to be the voluntary expression of the wishes of its signatories, *the effect then given to it depends on the extent to which it casts doubt on the significance of membership in the applicant as evidence of the employees’ desire for representation by the applicant.* In the use of membership evidence to test employee wishes, an employee for whom no membership evidence has been filed is treated as though he or she opposes representation by the applicant. Therefore, a non-member’s signature on the petition adds nothing to the assessment of support for representation by the applicant. However, *the signature on the petition of an employee who is a union member casts doubt not on that employee’s status as a member, but on the otherwise reasonable*

inference that the employee's membership in the trade union reflects a desire for representation by that trade union in collective bargaining with his employer. The evidence of an employee's membership, that is to say, the inference which otherwise reasonably follows from proof that the employee is a member, is "clouded" in that sense by that employee's subsequent signature on a voluntary petition.

[emphasis added]

See also *Baltimore Aircoil Inter-America Corporation*, [1982] OLRB Rep. Oct. 1387 at paragraph 36, *Re. Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees Union, Local 75 et al.*, [1981], 129 DLR 3rd 554 at 558 and *Elks Inc.* [1985] OLRB Rep. Feb. 244 at paragraphs 8.

28. The preamble of the petitions filed in this matter raise some concerns as to whether these statements cast any doubt on the employees' desire to have the union represent them in their relationship with their employer notwithstanding the membership evidence filed by the applicant union. On their face, the petitions do not clearly negate the usual inference inherent in the Legislature's choice of membership evidence as the *primary* basis for certification, that the act of joining the trade union indicates a desire by the employees for trade union representation and collective bargaining. The preamble is not a clear statement in opposition to the union, the union's application for certification, or union representation in general. Rather it expresses a desire for a secret ballot vote. In this regard this case is similar to petitions considered by the Board in *Crown Cork & Seal Company Limited*, [1977] OLRB Rep. Sep. 606 and in *The Diebold Company of Canada Ltd.*, *supra*.

29. In *Crown Cork & Seal Company Limited*, *supra* the preamble of the petition stated:

We, the undersigned, (including some who have previously signed the United Steelworkers of America membership cards) are opposed to the United Steelworkers of America becoming the representatives of the salaried non-supervisory personnel of Crown Cork & seal Company Limited, Concord, unless ALL eligible employees involved are given an equal opportunity to vote.

In that case the Board stated:

13. It cannot be inferred from the preamble that the employees who placed their signatures under it categorically oppose certification of the trade union. In his representation on behalf of the objectors Mr. R. H. Johnson candidly admitted that the preamble was first drafted in clear opposition to the union and that the words "unless ALL eligible employees involved are given an opportunity to vote" were added to the preamble when it became apparent to the sponsors of the petition that the employees who supported the union would not sign it otherwise. Seen in that light the petition is essentially an expression of disagreement with certification procedures under the existing legislation. It is not a categorical statement of opposition to the certification of the applicant union.

14. Because the Board must rely on hearsay evidence in applications for certification the documentary hearsay of a statement of desire objecting to certification must be no less clear and unconditional than the documentary hearsay of membership evidence. The membership documents filed are the unequivocal expression of the desire of a number of employees to be represented by the applicant union. Doubt as to the intention, on the terminal date, of the employees who so expressed themselves can be raised only by the submission of equally unequivocal statements of opposition to the union's application properly filed in writing before that date. The purported statement of objection filed in the instant case falls short of that standard and should not be admitted as evidence of objection by employees to certification or as a signification by employees that they no longer wish to be represented by the applicant within the terms of section 48(1) of the Board's Rules of Procedure.

30. Similarly, in *The Diebold Company of Canada Limited*, *supra* the Board dealt with a preamble of the petition which stated:

This is not a vote for or against the union. This is expressing my desire for to have an opened vote (re. secret ballot). I hereby elect the bearer to present this document at the hearing March 29/76.

In that case, the Board concluded:

13. The Board's discretion under Section 7(2) to order a representation vote when it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the trade union is exercised when it is presented with meaningful evidence of objection by employees to the certification of the trade union. Having regard to the preamble and to the evidence of Mr. Smith, the only inference which can be drawn from the statements placed in evidence in the instance case as to the intention of those who signed is that they wished a secret ballot. These are not statements of objection by employees to certification of a trade union. Although these statements may reflect opposition to Board practice and perhaps even to the manner in which the Board exercises its discretion under Section 7(2) they do not clearly express opposition or objection to the certification of the applicant trade union and the Board cannot infer that they do. (See *Ever-Bright Limited* case 57 CLLC 18053, *Green Giant of Canada Limited* case [1973] OLRB Rep. June 376, *New Ontario Dynamics Ltd.* case [1975] OLRB Rep. Nov. 845 at page 849). These documents do not therefore cause the Board to direct that a representation vote be taken.

31. Both these cases, (as well as the cases referred to therein) were decided before the Divisional Court's decision in *Re. Fisher*, *supra* and before the Board developed the "poster" form entitled "Notice to Employees" which currently accompanies each Notice of Application for Certification and of Hearing (Form 6). In *Re. Fisher*, *supra* the Court commented on the notice form then in use by Board in the following manner:

We were repeatedly reminded by counsel, for the Union and for the Board, that the Board had adopted the practice that came to light here to serve its pressing need for expedition. If that is so some other means will have to be found to serve that end; a means more in accord with fairness and the law. Perhaps, instead of informing hapless objectors who attend a hearing that they cannot be heard, or even recognized, because they have already fatally failed to conform to the Board's concept of a proper form of objection - expressed by the Board for the first time at the hearing - the Board might devise and furnish a form of objection to accompany Form 5 in terms that lay people would understand. Any serious deviation from such a form might justify a reaction in the Board of the type seen here, with less risk of unfairness, for the objectors would know beforehand what form was acceptable.

The Board has more than eighty forms set out in its Rules. To suggest that the Board might produce one more might not be thought unreasonable.

We can only assume that the dicta of the Court encouraged and assisted the Board in drafting the "Notice to Employees" currently used. That notice, which is provided to the respondent employer and is required to be posted in conspicuous places where the notices are most likely to come to the attention of the employees who may be affected by the application for certification, sets out in some detail the certification process of the Board and the rights of employees. In so doing it makes specific reference to petitions and the effect which the petition may have on a trade union's Application for Certification.

32. In this case the viva voce evidence established that Mr. Jowett read the forms and that, in fact, he knew from the Notice to Employees that in order to get a secret ballot vote he had to file a petition. Given the fact that the *only* effect which a petition can have upon the union's application is a direction by the Board that a secret ballot representation vote be held, the essence of

Mr. Jowett's submissions to this Board (with which counsel for the employer agreed) was that the very request for such a vote raised sufficient doubt about the unions's right to automatic certification based on its membership evidence. At first blush this argument appears to have substantial merit. After consideration of the matter however, we have concluded that to accept Mr. Jowett's submissions in this regard is factually erroneous, and would be contrary to the intention of the Legislature as expressed in the Act.

33. First, the "Notice to Employees" provides more information than the mere information that, in certain circumstances, a petition may result in a secret ballot vote. The notice specifically refers to the fact that a petition must be *in opposition to the union*. The notice refers to documents "*opposing the certification of the trade union*" or documents "*opposing the union*" and contains the following express provision:

documents recording employee opposition to certification of the union are often referred to as "petitions" in proceedings before the Board. *There is no standard form*. Whatever form the document takes, it must be signed by the employee or group of employees concerned. *As a minimum*, the document must name the employer and union involved *and state clearly that the employee or employees who have signed it are opposed to the applicant union being certified*.

[emphasis added]

34. In light of such clear and explicit language we do not accept the argument that a request for a secret ballot vote is tantamount to evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union. Rather, the request for a vote by secret ballot is a request for the Board to use an alternative method of ascertaining majority wishes. Contrary to the expressed guidelines as to the *minimum* requirements of a petition, the preamble of the petitions filed with the Board do not in *any* way state that the employee or employees who have signed the petitions are opposed to the applicant union being certified. The viva voce evidence of Mr. Jowett's supports that conclusion. Mr. Jowett did not present or "sell" the petition to other employees as a means through which they could oppose the union, or as a method by which they could raise doubt about the continued support amongst the employees for certification of the union. Mr. Jowett painted a contrary picture when he presented the petition to his fellow employees. He indicated that the petition would give employees some time to decide whether they wanted a union or not, and would provide a way of expressing their views on the matter in secret.

35. Secondly, we are of the view that to permit these petitions to adversely affect the union's entitlement to automatic certification where it has filed membership evidence on behalf of more than fifty-five percent of the employees in the bargaining unit, would be contrary to the expressed intent of the Legislature. The intent of the Legislature as expressed in the Act is that the *primary* method of determining employee wishes is through membership evidence and not the representation vote. For purposes of certification, the Legislature has afforded special status to membership evidence which complies with section 1(1)(l) of the Act. We have already expressed the view that petitions, whatever form they might take, and no matter what the actual wording of the petition, cannot and do not revoke, repeal or "cancel out" the membership evidence filed. The only effect which a petition can have is to raise sufficient doubt about the *continued* support for certification of the trade union amongst the employees in the bargaining unit as of the terminal date. If we were to accept Mr. Jowett's and counsel for the respondent's submissions in the circumstances of this case, we would be ignoring the Legislature's expressed intention that membership evidence, (filed in the form and manner prescribed by the Act) of over fifty-five percent of the employees in the bargaining unit is evidence of majority support for trade union representation sufficient to permit certification without a vote, by giving undue weight to a document which is nei-

ther in opposition to the union, and which raises no doubt about the continued support for the union amongst the employees in the bargaining unit. (See *Baltimore Aircoil, supra*).

36. For all of these reasons we have determined that the petitions filed are not “statements of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union.” As the applicant has otherwise established its entitlement to be certified as a bargaining agent of the employees of the respondent employer, a certificate will issue to the applicant. In view of our decision in respect of the first issue it is not necessary for us to determine whether the petitions filed are a voluntary expression of the true wishes of the employees. As the parties addressed the issue of the “voluntariness” of the petition, both in the evidence and in their submissions, we nevertheless consider it appropriate to render our decision on that issue.

37. We commence our determination of the second issue as to the “voluntariness” of the petitions filed with the observation that there was no evidence of any involvement by management in either the origination or circulation of the petitions. On the contrary, and upon the advice of counsel, when asked for advice about the petition Mr. Bunting specifically advised Mr. Jowett that he could not have any involvement with the petition and would offer no advice or comment. From the very beginning it would appear that management took a “hands off” approach.

38. The burden of proving that the petition is a voluntary expression of the true wishes of the employees lies with the party which asserts the voluntariness of the petition. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 the Board stated:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 64 CLLC 16,264 in the following terms:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

39. In determining whether the petition is a voluntary expression of the wishes of the employees, the Board reviews the overall environment of the workplace, and will consider whether employees might reasonably perceive employer participation in the statement of desire or might reasonably perceive that whether or not they sign a petition is likely to come to the attention of the employer. (See for example *Radio Shack, supra*, *Morgan Adhesives of Canada, supra*). In *Markham Hydro-Electric Commission*, [1984] OLRB Rep. Oct. 1481, the Board wrote at 1485-86:

Most non-union employers prefer to remain that way. Employees are as aware of this as they are of their economic dependence on their employer. Their sensitivity to these facts will be heightened during a union organizing campaign, even if, upon learning of the campaign, the employer does nothing overt to enhance that awareness. In these circumstances, an employee’s

freedom to choose to join or not to join a trade union will be impaired if he believes that the result of his individual exercise of choice will become known to his employer. For that reason, section 111 to the *Labour Relations Act* provides for confidentiality of membership evidence. For the same reason, representation votes, when they become necessary, are conducted by secret ballot. No one would suggest that the wishes of a group of employees with respect to union representation would be accurately reflected in a show of hands vote conducted in the presence of their employer. The same disability attaches to a petition which originates or circulates in circumstances which lead employees to believe that their employer will become aware of whether or not they sign. If the circumstances surrounding the origination and circulation of a petition might reasonably be expected to induce such a perception in the employees asked to sign it, that petition cannot be regarded as a voluntary expression of employee wishes. The Board will not act on a petition signed in such circumstances. That is so even if actual management involvement is proved, because the immediate issue is the reliability of the petition, not the propriety of management behaviour: see *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813.

The facts and circumstances of this case do not persuade us that the petition was a voluntary expression of the wishes of the employees. In our view, Mr. Jowett has not met the burden of proof.

40. In determining whether these petitions are voluntary expressions of the wishes of the employees, we have looked to the surrounding facts and circumstances to determine, on an objective basis, whether an employee might reasonably perceive the involvement of management in the petition or might reasonably perceive that whether or not he signed the petition was likely to come to the attention of the employer. In examining those surrounding facts and circumstances we have employed a subjective test. Applying such a test we conclude that an employee might reasonably perceive Mr. Jowett as acting on behalf of or with the support of management, and might reasonably perceive him as a person who could affect their employment status. In particular, we note Mr. Jowett's own personal status as a working foreman. That status was known not only to employees at the job site which he supervised, but was also known to a number of other employees. Those employees might reasonably conclude that management knew of, and supported the petition when a working foreman attends at their job site to talk about the union on a day when one would normally expect him to be supervising his own job site. In addition the petition was signed in the presence of the other working foremen at the various sites. An exception to this is the absence of Mr. Morelli from the employee meeting at the Fairmont Tower site. On that occasion however, the employees were aware that Mr. Morelli knew that Mr. Jowett was discussing a petition with the employees as Mr. Jowett himself had explained the purpose of his visit to a number of employees who entered the trailer while he and Mr. Morelli were discussing the matter. The circumstances surrounding the circulation of the petition raise a concern that the employees may have signed the document with a view to establishing or redeeming themselves in the eyes of their employer and/or their immediate supervisor, the working foreman. Given the surrounding circumstances we were concerned that the employees would reasonably perceive the petition was circulated at the behest of, or with the approval of management, and employees would reasonably perceive that whether they signed or refused to sign the petition would come to the attention of management. Similarly, the evidence discloses that the duties and responsibilities of the working foremen are such that employees would reasonably perceive that the working foreman had sufficient authority to affect their employment. To the employees on the site the working foreman is the "boss". In this regard we considered the cases of *I. M. Patuchak*, [1980] OLRB Rep. Jul. 979; *Quality Circus*, [1979] OLRB Rep. Aug. 794; *Trent Electric*, [1976] OLRB Rep. April 163; *Dad's Cookies* [1976] OLRB Rep. Sep. 545; *General Crane*, [1974] OLRB Rep. Oct. 662; *Apex*, [1983] OLRB Rep. Jan. 1; *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813; *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402; *Thornton Sand & Gravel*, [1987] OLRB Rep. Oct. 1331; *Chatham Concrete Forming*, [1986] OLRB Rep. April 426.

41. On the basis of all the evidence before us, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 24, 1988, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

42. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

43. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2618-88-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union Local 351, Applicant v. Admiral Linen Supply Limited, Respondent

Certification - Membership Evidence - Practice and Procedure -Respondent asking Board to appoint an officer to inquire into the voluntariness of the membership evidence or order a vote because the employees do not know English - Respondent not making any allegations of wrongdoing nor asserting that any particular individual did not know what he was signing - None of the employees coming forward to oppose application - Board issuing a certificate without officer appointment or vote

BEFORE: Robert D. Howe, Vice-Chair, and Board Members R. M. Sloan and H. Peacock.

APPEARANCES: Fernando Da Silva and Carlos Aedo for the applicant; W. R. Herridge and L. B. Rose for the respondent.

DECISION OF THE BOARD; February 20, 1989

1. The name of the respondent is amended to read: "Admiral Linen Supply Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, drivers, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. After hearing and recessing to consider submissions regarding a matter raised by the respondent in its reply, the Board unanimously ruled as follows at the hearing of this application on Friday, February 17, 1989:

In his able submissions on behalf of the respondent, Mr. Herridge has asked the Board to either appoint a Board Officer to inquire into the validity of the membership evidence or to direct that a representation vote be taken, on the basis that 16 of the 36 employees whose names appear on Schedule "A" of the employer's list have Panjabi as their native language and do not know English. For purposes of this ruling, we are prepared to presume that the respondent would be in a position to call evidence to establish the truth of that factual assertion and of the other factual assertions made by respondent's counsel during the course of his submissions.

Counsel for the respondent acknowledged that the Board jurisprudence does not support his client's position, but urged the Board to reconsider or decline to follow that jurisprudence in light of Ontario's present multilingual and multicultural fabric.

The Board has heard and rejected similar arguments on a number of occasions over the years. In *Olympia Home Bakery*, [1966] OLRB Rep. March 901, employer's counsel submitted that "none of the employees concerned could speak English and that this raised a doubt as to whether they understood the import of their actions in signing membership cards". In a brief decision, the Board indicated that it was "not prepared to find that the submission in any way affects the evidence of membership submitted by the applicant." In *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 688, the Board wrote, in part, as follows in rejecting an argument which is not materially different from that made on behalf of the respondent in the instant case:

7. The Board in this regard simply cannot be motivated by "suspicions" of a party to our proceedings in dealing with the propriety or otherwise of membership evidence. Allegations must be based on sound particulars, supported by fact. It may very well be that members of the bargaining unit may not comprehend the English language. Nevertheless, it does not follow that an applicant for membership did not comprehend the significance of writing his signature on his membership card. For example, he may have had a bilingual person who acted as collector, or a colleague in the bar-

gaining unit, explain the nature and purpose of the applicant's organizational campaign. This may or may not have been the case in the instant application. But for the Board to be motivated by suspicions on the basis of language alone would cause us to destroy and undermine the efficacy of a trade union's attempts to organize employees. *The Labour Relations Act* protects, at the Board's discretion, the identity of employees who have expressed, by their signatures, a desire to be represented by an applicant trade union. For the Board to conduct a judicial inquiry into the circumstances upon which membership signatures were secured, and without any allegation of wrongdoing, would necessarily entail the disclosure of the identities of persons who signed cards and, thereby, would cause a breach of the trust extended to us by the Legislature (section 100 [now section 111] of the Act.) In short, in absence of any allegation of wrongdoing, there must be a presumption in favour of the validity of the membership cards notwithstanding the particular national origin or mode of expression by the signatory thereto.

The Board has adopted a similar approach to the analogous issue of the ability of employees to understand Board notices in certification proceedings. In both *Javid Construction Management*, [1988] OLRB Rep. Sept. 906, and *Image Painters L. M. Inc.*, [1988] OLRB Rep. Aug. 807, the Board quoted with approval the following passage from *Federated Building Maintenance Company Limited*, [1979] OLRB Rep. Oct. 974:

13. Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or with public administrative tribunals. Immigrant Canadians generally obtain, and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal.... In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under *The Labour Relations Act*. (*IlSCO of Canada Ltd.*, [1973] OLRB Rep. May 221; *International Chinese Restaurant*, [1977] OLRB Rep. Oct. 688; *Dylex Ltd.*, [1977] OLRB Rep. June 357.)

In the present case, the respondent has not made any allegations of wrongdoing on the part of the applicant, nor has it asserted that any particular individual who signed a membership card did not know what he was signing. Moreover, none of the employees has come forward to oppose the application or to suggest that there was anything untoward about the manner in which the applicant collected its membership evidence. Under the circumstances and having regard to the considerations set forth in the aforementioned cases, we are not persuaded that we should have a Board Officer inquire into the validity of the membership evidence or that we should direct that a representation vote be conducted. Subject to the Board's usual second check of the membership evidence, a certificate will issue to the applicant.

6. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 2, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

7. A certificate will issue to the applicant.
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2488-82-R United Brotherhood of Carpenters and Joiners of America, Applicant v. **Aero Block and Precast Ltd.**, Kamet Enterprises Ltd. and 541190 Ontario Inc., Respondents v. The Form Work Council of Ontario, Intervener #1 v. Labourers' International Union of North America, Local 493, Intervener #2

Certification - Collective Agreement - Construction Industry -Intervenors arguing that certain persons employed by the respondents were hired contrary to the collective agreement and therefore should not be in the unit for purposes of the count - Board not applying *April Waterproofing* principle - Intervenors made no reasonable effort to make sure that the respondents had complied with the hiring provisions in the agreement

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Michael A. Church* and *Robert Reid* for the applicant; *Donald Francis* for the respondent; *Bernard Fishbein* and *Rocco Lotito* for intervenors #1 and #2.

DECISION OF THE BOARD; February 7, 1989

1. This is an application for certification made under the construction industry provisions of the *Labour Relations Act* in which a pre-hearing representation vote was taken, the ballot box sealed and all ballots cast segregated, all as directed by the Board. The need to seal the ballot box and segregate the ballots arose before the vote was directed from a variety of complex issues evident from the pleadings filed with the Board. Those issues and others arising out of the taking of the vote stood in the way of counting the ballots cast. Since the taking of the vote, all but one of those issues had been decided by the Board, settled by the parties or withdrawn. This decision deals with the one remaining issue.

2. The outstanding issue is the claim of the intervenors that certain persons employed by the respondents, or any of the respondents, were hired contrary to the requirements of the collective agreement between the Ontario Form Work Association and the Form Work Council of Ontario ("the Agreement") which was in force at the time. Therefore, it is alleged, those persons were not lawfully at work in the bargaining unit on the date of making of this application, the date for determining eligibility to vote or the date when the vote was taken. In the result, the intervenors contend that those employees should not be included in the bargaining unit for the purpose of deciding whether, pursuant to subsection 9(4) of the Act, the applicant had the requisite membership support for the vote to have the same effect as a vote taken under subsection 7(2) of the Act and/or, the employees should not be included on the list of eligible voters for deciding, pursuant to subsection 7(3), whether a majority of the ballots cast by eligible voters were cast in favour of the applicant.

3. The persons challenged by the interveners are:

G. Boissonneault	A. Lagassie
S. Chiochio	G. Lagassie
A. Covre	R. Lagassie
M. Gravelle	K. Lefebvre
A. Guillemette	S. Scarfone
C. Guillemette	D. Wall

The interveners rely on the Board's decision in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577. The decision deals with an application for certification to displace an incumbent trade union. Subsection 7(1) of the Act required the Board to ascertain the number of employees in the unit at the time the application was made and the number of those employees who were members of the applicant trade union at the relevant time. The Board found that three persons whom the employer claimed to be in the bargaining unit had not been hired in accordance with the provisions of a collective agreement between the employer and the incumbent bargaining agent. In the Board's opinion, in order for employees to be in the bargaining unit, they had to be employed under the terms of the collective agreement. Since the three employees had not been so employed, the Board was satisfied that they were not to be counted for purposes of the subsection 7(1) findings.

4. Before dealing with the parties' submissions on the *April Waterproofing* issue, it is useful to review briefly the history of this application. It was made March 4, 1983 and had been preceded by one made November 16, 1982, by a constituent local of the applicant. That first application had been made with respect to the employees of the respondents Kamet Enterprises Ltd. and Aero Block & Precast Ltd. The first applicant had requested the Board to treat the two respondents as constituting one employer pursuant to the provisions of subsection 1(4) of the Act or to declare Aero Block to be the successor employer to Kamet as a result of a sale of a business within the meaning of section 63 of the Act. The interveners herein intervened in that application as well and requested the same declarations as the applicant. Kamet's reply identified intervenor #1 as a trade union holding bargaining rights for employees in the proposed unit pursuant to the Agreement which had an expiry date of April 30, 1983. Kamet filed a list of employees in the bargaining unit containing 13 names. Its reply denied that there was any basis for the Board to have authority to issue the declarations requested by the applicant and interveners. Aero Block made the same denial and stated that it was the payroll company for Kamet. The Board, differently constituted, issued a decision dated January 5, 1983 setting out the events of a hearing held on December 23, 1982. At the hearing, Kamet, Aero Block and the interveners agreed that the respondents carried on related activities or businesses under common control or direction and should be treated as constituting one employer for purposes of the Act and, therefore, were bound to the Agreement. The first applicant took no position on their agreement. Consequently, the Board accepted the agreement of the respondents and interveners and declared that the two respondents were to be treated as one employer for purposes of the Act and were bound to the Agreement. The effect of the declaration was to make the first application for certification untimely. In those circumstances the first applicant requested leave to withdraw its application and the Board consented thereto.

5. The job site on which the employees were working at the time when the first application was made was dormant during January and February 1983, reopening in the latter part of February or early March. When the applicant herein made this application on March 4, 1983, it found many of the same employees on the job who had been there when the earlier application was made. Kamet and Aero Block were named as respondents to the application. They filed a joint reply and a list of employees containing the names of three persons. The reply identified intervenor #1 as an interested trade union pursuant to the Agreement. The interveners filed separate interventions

each relying on the Agreement. Approximately two weeks later, the applicant wrote to the Board requesting that 541190 Ontario Inc. be added as a respondent and that the Board declare it and the other two respondents to be treated as constituting one employer for purposes of the Act pursuant to subsection 1(4) or to be the successor in a sale of a business from either of them within the meaning of section 63 of the Act. The interveners and Kamet/Aero Block responded to that request by letters from their respective counsel. Intervener #2 claimed that it had entered into a voluntary recognition agreement on February 28th with 541190 Ontario Inc. and that the agreement made the application untimely. Kamet/Aero Block denied that either of them was related to the numbered company within the meaning of subsection 1(4) of the Act or had been a party to any kind of sale.

6. A Board officer held a pre-hearing vote meeting with the parties on May 6th. The parties agreed at the meeting that the Board should declare the three respondents to be treated as constituting one employer for purposes of the Act. As part of that agreement, intervener #2 agreed not to pursue its allegation of a collective agreement bar to the application and the respondent agreed not to pursue allegations of violations of the Act associated with the alleged collective agreement. Counsel for the respondents produced a list of employees on behalf of the numbered company containing the names of eleven persons. Six of the names had been on the list filed by Kamet on the first application. The interveners challenged all eleven names on the grounds that they had not been employed in accordance with the Agreement. This is the *April Waterproofing* issue.

7. The Board, by decision dated May 10, 1983, directed the taking of a pre-hearing representation vote. Two days later, counsel for the interveners filed with the three respondents a grievance alleging that they had employed the twelve persons named above at paragraph 3 contrary to the Agreement. The vote was taken as directed on May 19th and, following the taking of the vote, counsel for the interveners duly requested a hearing on the outstanding issues, including the *April Waterproofing* issue.

8. The hiring provisions in the Agreement relevant to this application which the interveners allege were contravened state as follows:

ARTICLE 3 - UNION SECURITY

3.1 All employees shall, when working in a position within the bargaining unit described in Article 2 hereof, be required, as a condition of employment, to be a member of the Union before commencing employment and shall be required to maintain such membership while working within the bargaining unit for the duration of this Agreement, and all work falling within the scope of this Agreement shall be performed by bargaining unit members only.

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“B” FOR LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

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iv) It is agreed that upon an Employer performing work covered by this Agreement within the geographical jurisdiction of any other Local of Labourers’ International Union of North America, which Local has entered into an understanding with the Union and the Association, then, representatives of the Union, the Employer and the other Local Union shall convene a prejob conference prior to commencing such work, in order to discuss, among other things, the employment of persons at such project.

9. The Board did schedule a hearing of the issues which were outstanding at the conclu-

sion of the vote. From that hearing until February 25, 1988, the parties agreed to proceed issue by issue. The Board accepted their agreement and, between or during many consent adjournments, the issues were decided by the Board after hearing, resolved by the parties or withdrawn until this final issue came on for hearing on February 25th. At the hearing on February 25th, it was undisputed that the 12 persons named above had been hired by the respondents without regard for the requirements of the Agreement. It was undisputed also that the interveners did not approach, at any time, any of the 12 employees about becoming members of intervener #2 and, prior to filing the grievance on May 12, 1983, had not asked the respondents to remove them from the project and replace them with persons hired pursuant to the Agreement.

10. Counsel for the interveners argued that, but for the respondents' breach of the hiring provisions, the 12 employees would not have been at work on the dates material to this application. Therefore, pursuant to the principle in the *April Waterproofing* decision, the 12 employees should neither be considered employees at work in the bargaining unit on the date of making of the application nor employees at work on the date for determining eligibility to vote or the date when the vote was taken. In the first instance, therefore, they would not be employees for purposes of determining the number of employees in the unit when the application was made or the number of employees in the unit who were members of the applicant. In the second instance, they would not be employees who were eligible to vote in the representation vote. Counsel submitted further that the *April Waterproofing* principle applied whether an employer's violation of the hiring provisions was purposeful or inadvertent. The result is the same; that is, employees who should not have been at work in the bargaining unit when the application was made are there because of the employer's breach of its collective agreement with the incumbent trade union. He argued that the Board decided in *April Waterproofing* that employees not lawfully at work could not provide the basis for an application for certification which would have the effect, if successful, of displacing the incumbent bargaining agent whose rights under the collective agreement had been contravened by the employer's unlawful act. Counsel traced the Board's application of the *April Waterproofing* principle up to the date of hearing into the issue herein. In doing so, counsel sought to distinguish on their facts those cases in which the Board declined to apply the *April Waterproofing* principle.

11. Applicant counsel argued that, on two grounds, it would be inappropriate for the Board to apply the *April Waterproofing* principle in the circumstances of this case. First, because the interveners, after first raising their claim that the respondents' employees were on the project at the material times contrary to the provisions of the Agreement, failed to pursue the claim with reasonable diligence. Second, because the development of the Board's jurisprudence since the *April Waterproofing* decision shows the Board to have been flexible in applying the principle even where there have been breaches of the hiring conditions in collective agreements. In other words, the Board has not applied the *April Waterproofing* principle as a strict rule but has adopted a purposive approach. The circumstances of this case, counsel submits, distinguish it from those in which the Board has applied the principle and make it analogous to those cases in which the Board has not applied the principle. That, according to counsel, is because it is implicit in the *April Waterproofing* decision and the decisions where its principle has been applied, that the employer who has breached his collective agreement obligations has done so to assist the raiding union and, in this case, the facts show the respondent to have sided with the interveners at every stage of both applications for certification. In addition, the interveners and respondents knew from the time of the first application that the applicant was seeking to represent the respondents' employees and they took no action to protect themselves by enforcing compliance with the Agreement. Applicant counsel claimed that the interveners' failure to act or to act promptly was condonation of the alleged breaches of the Agreement and they should not be allowed now to rely on those breaches to found their *April Waterproofing* argument. In effect, counsel argued, there is no mischief to

cure by application of the *April Waterproofing* principle, therefore no need to apply it in the facts of this case.

12. The Board finds no merit in the applicant's first ground. The interveners acted promptly to raise the *April Waterproofing* issue at the meeting held with the Board officer prior to the taking of the representation vote and later confirmed the issue in writing after the vote, requesting a hearing on it and the other outstanding issues. Absent some direct evidence that the interveners were "laying in the weeds" on the issue, the fact that the issue was the last one to be heard is irrelevant when the parties agreed, and the Board accepted their agreement, to proceed on an issue by issue basis. This is particularly so where, as was the case here, the parties themselves agreed on which issues the Board should deal with and in what order. With respect to the second ground, it will suffice for now to say that the Board does not agree with applicant counsel that the facts show the respondents to have sided with the interveners at every stage of the two applications. The most that the Board would be prepared to infer from the facts is that the respondents were allied more in interest to the interveners than to the applicant because of their obligations under the Agreement.

13. The issue for the Board in *April Waterproofing, supra*, was whether certain persons hired by the employer contrary to the provisions of a collective agreement with an incumbent trade union were employed in the unit of employees covered by that agreement. The Board expressed the view that "... the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement." The Board went on to find that the "... individuals in dispute were not hired in accordance with the provisions of the collective agreement ..." and, on that finding, was satisfied that they should not be taken into account "... in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act,...". The principle of the *April Waterproofing* decision is succinctly described in the following terms at paragraph 21 of the Board's decision in *Culliton Brothers Limited*, [1983] OLRB Rep. Mar. 339:

21. This approach was subsequently adopted in *Cooper Construction, supra*. It must be noted it does not require advertent misconduct on the part of the employer. Although in *April Waterproofing* it was alleged that the employer had intentionally hired the two employees to foster a raid, the Board did not hear evidence on, or determine, that issue. *April Waterproofing* stands of the proposition that employees illegally hired contrary to the terms of an existing collective agreement should not be considered employees in the bargaining unit even though their hiring was inadvertent and not intended to foster a representation application. The fact that the employer may not have intentionally breached its contractual obligations is no answer to the prejudice which his actions may cause.

The Board, in that case, chose not to adopt the *April Waterproofing* approach because it found that the persons who were alleged to be unlawfully at work were pre-existing employees who had been swept into the bargaining unit by operation of statute.

14. The Board also found the *April Waterproofing* principle not to have application in *Pierre A. Gratton Construction Inc.*, [1986] OLRB Rep. Jan. 137. In that case the employer, P. H. Grager Inc., was a company formed by three partners who included the owner of a dormant company, Pierre A. Gratton Construction Inc. Gratton was bound to a collective agreement with the Labourers union. Grager Inc. did not know that section 63, the sale provisions of the Act, bound it to the same agreement. It proceeded to hire carpenters and labourers, including some labourers who had worked for Gratton as members of the Labourers union, and performed work on a highly visible project in the Ottawa area. The Carpenters union filed an application to be certified as bargaining agent for the employees of Grager Inc. The Labourers union intervened in the application and filed an application under section 63 for a declaration that Grager Inc. was the successor employer to Gratton and bound to the Labourers union agreement. The intervention raised the

claim that the persons employed by Grager Inc., whom the Carpenters union were seeking to represent, had been hired contrary to the Labourers' collective agreement and should not be counted as being in the bargaining unit. The Board's reasons for not applying the *April Waterproofing* principle are found at paragraph 11:

Obviously the potential for mischief in a situation of unlawful hiring is, as the Board has repeatedly pointed out, considerable. Accordingly, the Board, particularly with its knowledge of the construction industry, has not hesitated to presume, in the words of *Inducon, supra*, that the employer intended the natural consequences of his acts. That presumption is rebuttable, however, in the face of cogent evidence, and the Board on the evidence before it in the "sale" application is unanimously of the view that the principals of Grager were acting in good faith, and did in fact believe that the new, merged undertaking was not the subject of the shelved Pierre Gratton Construction Inc.'s collective agreement. We are satisfied that the principals of Grager made no effort whatever to hide the operations of "Grager" from the intervener Labourers' Union; in fact, they willingly hired individuals whom they knew to have been members of the Labourers' Union through their prior employment with "Gratton". The "Grager" company was in the field bidding on and performing jobs in the high-profile Transitway project for a substantial period of time before the Labourers', through their counsel, began to assert their claims. While the race is not simply to the swiftest, the Board can expect some measure of diligence in the unique world of construction, where unions know they must move quickly to organize or assert bargaining rights before a project is completed. Here the Carpenters' Union expended its resources in a good-faith effort to organize the apparently unrepresented employees of "Grager", and it is the decision of the Board that their application for certification is entitled to proceed, on the basis of the persons "employed" as of the date of the certification. (emphasis added)

15. Thus, it may be seen that the *April Waterproofing* principle does not fit every situation in which employees may be employed in a bargaining unit contrary to the provisions of a collective agreement. The Board has been prepared, in the face of cogent evidence, to look beyond the simple fact that challenged persons were hired contrary to a collective agreement before it decides whether to apply the principle in a particular case. Does the principle have application in the instant case?

16. The Board thinks not. While the interveners responded to this and the first application by intervening to assert their bargaining rights under the Agreement, they were content to stop at that. They did nothing to enforce those bargaining rights to the benefit of their members. In particular, between signing a voluntary recognition agreement with the numbered company on February 28th, purportedly binding it to the terms and conditions of the Agreement, and the Board's one-employer declaration respecting the three respondents, the interveners did not seek to have any of the 12 employees become members of intervener #2 or require the numbered company to replace them with the intervener's members. It is obvious that, when intervener #2 signed the agreement with the numbered company, it knew that work had resumed or was about to resume on the project. Yet, a few days later on March 4th, when the applicant made this application, the interveners had done nothing to make sure that the numbered company obtained its employees from intervener #2 in accordance with their agreement. The applicant, on the other hand, knowing what had happened with the first application, thought they were employees of Kamet/Aero Block. It was not unreasonable, then, for the applicant to expect that the employees on the project, particularly the six who had been on it during the first application, had been employed pursuant to the Agreement. Clearly, it was with that expectation in mind that the applicant used its resources to make this application. To apply the *April Waterproofing* principle would be to frustrate the applicant's application in circumstances where the interveners have made no reasonable effort to make sure that the respondents would comply with the hiring provisions found in the Agreement. It would have the effect of rewarding the interveners for their lack of diligence in enforcing their bargaining rights. To put it colloquially, it would be rewarding them for sitting on their bargaining rights because, by doing nothing, they would have succeeded in frustrating the application. In

these circumstances, the Board will not apply the *April Waterproofing* principle and the application will proceed.

17. Accordingly, the Board finds that

G. Boissonneault	A. Lagassie
S. Chiocchio	G. Lagassie
A. Covre	R. Lagassie
M. Gravelle	K. Lefebvre
A. Guillemette	S. Scarfone
C. Guillemette	D. Wall

were employees in the bargaining unit on March 4, 1983, the date of making of this application, on March 15, 1983, the date for determining eligibility to vote and on May 19, 1983, the date on which the representation vote was taken. In the result, they were employees in the bargaining unit for purposes of determining whether the applicant had as its members the requisite number of employees in the bargaining unit in order for the vote to have the same effect as a vote taken pursuant to subsection 7(2) of the Act and were employees who were eligible to vote on May 19th.

18. In a decision which issued August 21, 1986, a differently constituted panel of the Board, having regard to an agreement of the parties set out at paragraphs 1 and 2 of the interim report of a Board officer dated September 11, 1985, and a further agreement of the parties made August 12, 1986, the Board found the following bargaining units to be appropriate.

Bargaining Unit #1

All carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman.

Bargaining Unit #2

All construction labourers in the employ of the respondent within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

The Board also made the finding that the following employees of the respondents were in those units:

Bargaining Unit #1

Allard, D.	Lagassie, A.
Boissonneault, G.	Lagassie, G.
Gravelle, M.	Lagassie, R.
Guillemette, A.	Lefebvre, K.
Guillemette, C.	

Bargaining Unit #2

Covre, A.
Scarfone, S.

The parties remain in dispute respecting whether V. Alberico, C. Crimi, G. Masherin and E. Vanin are in bargaining unit #1 or bargaining unit #2.

19. Having regard to the foregoing, the Board:

- (1) finds that for purposes of the pre-hearing vote, there were two voting constituencies each conforming to the bargaining units described above;
- (2) is satisfied that, regardless of which unit the four disputed employees were employed in on the date of making of the application, not less than thirty-five per cent of the employees of the respondents in bargaining unit #1 were members of the applicant at the time the application was made; and
- (3) regardless of which unit the four disputed employees were employed in on the date of making of the application, the Board is not satisfied that not less than thirty-five per cent of the employees of the respondents in bargaining unit #2 were members of the applicant at the time the application was made.

In the result, the application respecting bargaining unit #2 is dismissed.

20. Having further regard to the findings in paragraphs 18 and 19 and to the agreements of the parties, the Board finds that the following employees of the respondent were eligible to cast ballots in the pre-hearing vote respecting bargaining unit #1:

D. Allard	A. Lagassie
G. Boissonneault	G. Lagassie
A. Dasilva	R. Lagassie
M. Gravelle	K. Lefebvre
A. Guillemette	P. Luchetto
C. Guillemette	V. Paruzza.

As the Board noted above it is still disputed whether V. Alberico, S. Crimi, E. Vanin or G. Masherin were eligible to vote in that unit. In all of these circumstances, the Registrar is directed to unseal the ballot box and count the segregated ballots of the 12 employees whom the Board has found to be eligible to cast ballots. The segregated ballots of the four employees in dispute are not to be counted pending the further direction of the Board. No other segregated ballots are to be counted, including the ballots cast, if any, by S. Chiocchio, A. Covre, S. Scarfone and D. Wall who were employees in bargaining unit #2 at all times material to the vote.

21. In summary, with respect to bargaining unit #1, the ballots cast in the pre-hearing vote are to be counted pursuant to the Board's directions in paragraph 20 and, with respect to bargaining unit #2, the application is dismissed.

1612-87-R; 1613-87-R; 1614-87-R; 1615-87-R; 1616-87-R; 1617-87-R; 1618-87-R; 1619-87-R; 1620-87-R; 1702-87-R; 1633-87-R International Woodworkers of America, Applicant v. Taiga Trucking (Ontario) 1980 Inc., Respondent; International Woodworkers of America, Applicant v. Menroy Trucking Inc., Respondent; International Woodworkers of America, Applicant v. **Atway Transport Inc.**, Respondent; International Woodworkers of America, Applicant v. Demers & Dargy Transport Inc., Respondent; International Woodworkers of America, Applicant v. Gosselin Trucking, Respondent; International Woodworkers of America, Applicant v. Paul Gagnon Trucking, Respondent; International Woodworkers of America, Applicant v. J. Bernard Trucking, Respondent; International Woodworkers of America, Applicant v. Contractors Cleanup Services Limited, Respondent v. Labourers International Union of North America, Local 706, Intervener; International Woodworkers of America, Applicant v. Kopka Transport Inc., Respondent; International Woodworkers of America, Applicant v. Paramount Transportation Limited, Respondent; International Woodworkers of America, Applicant v. Atway Transport Inc., Kopka Transport Inc., Taiga Trucking (Ontario) 1980 Inc., Gosselin Trucking, Demers & Dargy Transport Inc., J. Bernard Trucking, Paul Gagnon Trucking, Menroy Trucking Inc., Contractors Cleanup Services Limited and Paramount Transportation Limited, Respondents

Certification - Evidence - Practice and Procedure - Related Employer -Board determining procedure for dealing with certification and related employer applications involving ten respondents - Respondent arguing that Board is without jurisdiction to adjudicate the related employer application until it has determined the applicant's right to be certified for any or all respondents - Respondents argument that it is a prerequisite to a s.1(4) declaration that there exist some bargaining rights dismissed - Board determining that related employer application should be dealt with first - Applicant's request that certain documents be produced in advance of hearing granted - Board also encouraging parties to voluntarily produce in advance documents on which they intend to rely

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. A. Correll* and *C. McDonald*.

APPEARANCES: *W. Dubinsky* for the applicant; *F. J. W. Bickford* for the respondent, Atway Transport Inc.; No one appearing for any of the other respondents.

DECISION OF THE BOARD; February 24, 1989, as amended March 6, 1989

1. These applications came on for hearing before this panel of the Board on February 13, 1989. The purpose of the hearing as set out in the Notice of Hearing sent to each of the parties to these various applications was as follows:

TAKE NOTICE of the hearing by the Board **FOR THE PURPOSE** of considering the parties' representations with respect to the manner of procedure in this matter, including if necessary, such directions respecting pleadings and disclosure as appear to be necessary and any other matters of procedure arising from these applications.

In addition to the purpose of the hearing, each party was also notified of the date, time and place of the hearing.

2. At the commencement of the hearing the only parties present were the applicant trade union, the International Woodworkers of America (I.W.A.) and Atway Transport Inc. (Atway) which is the respondent in Board File No. 1614-87-R as well as a respondent in Board File No. 1633-87-R, (an application under subsection 4 of section 1 of the Act). As none of the other respondents were then present, the Board adjourned these hearings for thirty minutes in the event any of the other respondents had been delayed for reasons beyond their control. The hearing resumed at 10:00 a.m. None of the other respondents were in attendance either at that time or at any time throughout the day when matters relating to the procedure in this matter, including matters relating to the pleadings and disclosure, were addressed by Atway and the I.W.A.

3. A review of the files by this panel of the Board indicated that a pre-hearing conference had been conducted. There did not appear to be agreement amongst the parties on many (if any) matters, as many issues remain in dispute. In an effort to expedite the hearing we identified the following issues which arose in the ten applications for certification and request for pre-hearing vote, and the application filed pursuant to section 1(4) of the Act. Both Atway and the I.W.A. concurred that it would be difficult for this Board to deal with certain matters of procedure unless the Board had a complete understanding of the complexity of the issues arising from these eleven files.

4. The issues so identified may be summarized as follows:

1. The description of the appropriate bargaining unit.
2. The composition of the bargaining unit including
 - (a) whether certain persons are employees or independent contractors, and
 - (b) if such persons are employees, whether they are employees who are dependent contractors, and
 - (c) if such employees are dependent contractors, whether such employees should be included in a mixed unit or whether such employees constitute a separate unit pursuant to section 6(5) of the Act.
3. The effect, if any, of the fact that nine of the ten certification applications were filed on September 11, 1987 while the tenth application was filed on September 22, 1987.
4. The effect, if any, of the applicant's communications with employees prior to the taking of the vote
 - (a) on the obtaining of membership evidence in support of the application for certification and a pre-hearing vote, and
 - (b) on the vote itself
5. The effect, if any, of the applicant's request to be certified as bargaining agent for employees of Atway by reason of the provisions of section 8.
6. The effect, if any, of the statements of desire filed in Board Files No. 1613-87-R, No. 1616-87-R, and No. 1620-87-R.

5. Each of these issues must necessarily be decided in the event that the Board issues a declaration pursuant to section 1(4) of the Act and the ten respondents, or any combination of these ten respondents, are declared to be one employer for purposes of the Act. Similarly, many, although not all of the issues, must be determined in the event that the Board does not declare these ten respondents, or any combination of the ten respondents, to be one employer for purposes of the Act. In the latter case each of the certification files would be dealt with on an individual basis, and only those issues arising from any particular application would be dealt with by the Board.

6. The parties were invited to set out any other issues arising from these applications. The applicant indicated that there were no other issues. In addition to the issues identified by the Board, counsel on behalf of Atway identified as an issue what he characterized as an “onus” on the applicant union to “exhaustively” set out a list of persons purporting to be employees in the bargaining unit sought by the applicant. Counsel stated that this issue arises because, at the meeting with the Labour Relations Officer, the I.W.A. added thirty-three names to the voters’ list in respect of employees of Atway. Counsel for Atway states that these persons are independent contractors and not employees. Atway has challenged the inclusion on the list of each of these persons. Counsel argues that the union has failed to specify whether it is the union’s position that these persons are “employees” or “dependent contractors”. Counsel submits that if the I.W.A.’s position is that these persons are “dependent contractors”, and if the I.W.A. is seeking to add “dependent contractors” to a unit described as “all employees of the respondent employed as truck and transport drivers” there is an onus on the union to identify “all others similarly situated”. Counsel submits that the union cannot pick and choose to include on the voters’ list only those persons for whom it has acquired membership evidence and cannot frame its application for certification in a manner which is consistent only with its level of support amongst certain types of persons “employed” by the respondent Atway. Counsel for Atway argued that it was incumbent for the union therefore to identify to the Board *all* persons who would be “dependent contractors” in the event these thirty-three persons are found to be “dependent contractors” or “employees” pursuant to the *Labour Relations Act*. In the alternative, counsel argued that it was incumbent on the Board to make appropriate inquiries to ensure that there were no persons “similarly situated” to the thirty-three persons whom the I.W.A. added to the voters’ list. When invited to do so by the Board, counsel declined to provide any particulars as to whether or how many other persons might be “similarly” situated. He indicated that in his view it was not incumbent on Atway to provide such information. We have noted this matter only because it was raised by counsel as an outstanding issue. As we have not had the benefit of full argument or submissions in respect of this issue, we have not at this stage, addressed the merits of counsel’s argument (indeed as we have not on any of the other issues identified). In respect of this particular issue however, counsel is referred to paragraph 17 of the Board’s earlier decision in this matter reported at [1987] OLRB Rep. Nov. 1433.

7. After identification of the issues we proceeded to hear counsel’s submissions in respect of the most appropriate manner of proceeding in this matter. In addressing the manner of procedure, counsel for Atway raised as a preliminary matter, the jurisdiction of the Board to deal with the application under section 1(4) of the Act (Board File No. 1633-87-R) in the absence of an adjudication of the certification applications. At the conclusion of both counsel’s submissions in respect of the manner of procedure, we rendered the following oral ruling:

We have before us ten applications for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote. The applicant has also filed an application for a declaration under section 1(4) of

the *Labour Relations Act* that the respondents to these ten applications constitute one employer for purposes of the Act.

The respondent Atway Transport Inc. (Atway) has argued that the Board is without jurisdiction to adjudicate upon the section 1(4) application until it has determined the applicant's right to be certified as bargaining agent for any or all of the respondents in the certification applications. The respondent Atway submits that one of the prerequisites to the Board issuing a section 1(4) declaration is that there exists *some* bargaining rights. The respondent Atway argues that the threshold question, or the foundation which must be established by the union *before* it can apply under section 1(4) is the union's right to represent *some* employees of any of the respondents whom it seeks to join in its section 1(4) application. Atway argues that the purpose of section 1(4) is to preserve bargaining rights, not to extend them and therefore the prerequisite is that the applicant union have some bargaining rights which it is seeking to preserve.

Atway argues that the appropriate order of procedure is to dispose of the certification applications first and to adjudicate upon the section 1(4) application only after the Board has dealt with the certification applications.

The applicant union made contrary submissions. The applicant argues that either the section 1(4) application should be dealt with first, separate and apart from the certification applications. Alternatively, these matters should be dealt with together. The applicant points to Rule 31 which states:

Subject to the giving of notice and the provision of particulars, nothing contained in sections 27 to 30 shall prevent an applicant from claiming relief under subsection 1(4) of the Act in *any* proceeding under the Act.

The applicant argues that it is necessary for the Board to adjudicate upon the section 1(4) application in order to determine *who* is the employer of the employees on whose behalf the union seeks to acquire bargaining rights.

After having considered the submissions of the parties we have determined that the existence of some bargaining rights is not a prerequisite to the union's application under section 1(4). We agree with Mr. Dubinsky that Rule 31 permits the filing of the section 1(4) application at any time and in any proceedings under the Act.

We are of the view that section 1(4) specifically empowers this Board to grant a single or common employer declaration "for the purposes of this Act". In our view, such "purposes" include the purpose of dealing with, and disposing of, certification proceedings brought under the Act.

The respondent Atway has also argued that the Board should not deal with the section 1(4) application because the union has not pleaded in any particularity the necessary requisites for a section 1(4) declaration. In effect, Atway argues that the lack of pleading in this case ought to cause this Board to refuse to hear the section 1(4) application pursuant to section 71 of the Board's Rules as the applicant has not made out a *prima facie* case for relief under section 1(4). For reasons enunciated in *Guaranteed Insulation '77*

Limited, [1981] OLRB Rep. Oct. 1394 we do not agree with counsel in this regard.

Having regard to the foregoing and the submissions of the parties we have determined

- (a) that the Board *has* jurisdiction to deal with the section 1(4) application filed prior to, or concurrent with the certification applications, and
- (b) in the circumstance of this case the Board will deal with the section 1(4) application first. The Board will therefore first determine whether these ten respondent employers, or any combination of the ten respondent employers, carry on associated or related activities or businesses, and are under common direction or control, and if so, whether the Board should exercise its discretion to issue a common employer declaration. After we have dealt with that matter we will deal with the other issues identified.

8. Thereafter, the Board dealt with a request by counsel for the I.W.A. for certain documents to be produced in advance of the hearing. Counsel argued that production in advance would expedite the hearing insofar as it would not be necessary for him to seek adjournments to review documents (which he would see for the first time) as the documents were introduced through the witnesses testifying in this matter. Counsel indicated that he had made requests of the various respondents for such production but to no avail. Counsel for Atway opposed the motion to have the Board direct that any documents be produced in advance, stating that his client was aware of its statutory duty pursuant to section 1(5) and intended to comply with that duty when the matter was heard. Counsel argued that in the absence of any evidence to indicate that Atway would not meet its statutory obligation, it would be premature for the Board to direct production in advance.

9. After considering the submissions of the parties we made the following oral ruling:

The Board directs that each of the respondents deposit with the Registrar of the Labour Relations Board (at 400 University Avenue, Toronto, Ontario) for inspection by each of the other parties to these proceedings the following documentation and information.

- 1. The minutes of any Board's of Directors meeting for 1986 and 1987.
- 2. The names of the officers and Directors of the Company in the years 1986 and 1987.
- 3. The names of the shareholders of the Company in 1986 and 1987.
- 4. Any contracts and/or agreements entered into, between and amongst, the named respondents (or any combination of named respondents).
- 5. Such documentation and records as are required by statute to be maintained in respect of remittances by the company to the Unemployment Insurance Commission, the Workers' Compensation Plan,

or the Receiver General of Canada for purposes of the Canada Pension Plan.

6. Any employee manual, rules, handbook, contract, benefit or insurance policies relating to the employment terms and conditions of drivers or owners/operators engaged by the respondent.

Such documentation is to be deposited with the Registrar on or before Wednesday, March 15, 1989. After March 15, 1989, the documentation will be available for inspection by the other parties to these proceedings between the hours of 9:30 a.m. and 4:30 p.m. Monday to Friday, provided that the Registrar receives Notice in writing twenty-four hours in advance of the date upon which inspection is sought.

The persons viewing or inspecting those documents are to maintain in confidence the information contained in the document. The documents are not to be disclosed to any other person, and may not be used for any purpose other than the matter before the Board.

10. We consider it appropriate to provide our reasons for directing production of these documents. We begin by observing that section 103(2)(a) gives to the Board the power to:

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases.

Of equal significance, we note that section 1(5) of the Act provides:

where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

In our view the combination of these provisions support our approach to this manner to encourage full and frank disclosure of material facts in advance of the hearing.

11. In this type of case the Board often convenes a pre-hearing conference which often leads to advance production of documents, and in a narrowing of the issues in dispute. The pre-hearing conference also provides a forum which promotes settlement discussions. In this case it is apparent from the file that a pre-hearing conference was convened with the Alternate Chair of the Board. It would appear that one of the Board's Labour Relations Officers has also had extensive discussions with the various parties. In keeping with the purpose of such pre-hearing mechanisms and the confidential and normally "without prejudice" nature of such conferences, we are not aware of what was discussed or resolved during the various meetings conducted by the Alternate Chair or the Labour Relations Officer. We note however, that a substantial number of issues remain in dispute and that there has not been *any* exchange of documents despite these pre-hearing conferences or the applicant's requests for advance production.

12. Applications made pursuant to section 1(4) tend to be lengthy and often involve much evidence. At the end of the case a portion of that evidence, inevitably proves to be non-contentious, and ultimately is not in dispute between the parties. In this case there are ten respondents. Both counsel, rather optimistically in our view, estimated that the hearing of the section 1(4) appli-

cation alone would take approximately six days. After we have disposed of that matter, and regardless of its outcome, a large number of issues will remain outstanding. It is quite likely that the number of hearing days required before these matters are finally concluded will exceed the fifteen days which we have currently set. In these circumstances, advance production which will expedite the hearing and thus reduce the expenditure of time, money and other resources of the parties (to say nothing of the resources of the Board) is to be encouraged and promoted.

13. Finally, we adopt the reasoning of the Board in *Ontario Bus Industries Inc.*, [1988] OLRB Rep. Sept. 914 where the Board stated at pages 917-919

13. In recent years the Board has taken a number of steps to foster advance production of documents, with a view to promoting settlement discussions and expediting the hearing process by narrowing the issues in dispute and minimizing the need for document related adjournments. Practice Note No. 18 (dated May 27, 1986) requires that an application requesting the Board to direct that a first collective agreement be settled by arbitration include a copy of all documents in the applicant's possession on which it intends to rely, and further requires the applicant to deliver a duly completed copy of the application (including those documents) to the respondent prior to filing the application with the Board. Similarly, that Practice Note requires that the respondent's reply (which must be filed within ten days from the day the application was delivered to the respondent) include a copy of all documents in the respondent's possession on which it intends to rely, and further requires that the respondent deliver a duly completed copy of the reply (including those documents) to the applicant prior to filing the reply with the Board. Practice Note No. 19 (dated June 6, 1986) requires each party to arbitration proceedings before the Board in respect of the settlement of a first collective agreement to file with the Board and with each other party, no later than nine days from the date on which the notice initiating the proceedings was filed with the Board, all documentation (as well as the information and submissions) on which it relies in support of each bargaining matter that remains in dispute. Practice Note No. 15 (dated August 2, 1988), in conjunction with section 60 of the Board's Rules of procedure, requires a complainant to file, together with its jurisdictional dispute complaint, a copy of all documents relating to the work in dispute which may be in its possession and upon which it proposes to rely in support of its claim for relief. That Practice Note also stipulates that prior to filing its complaint with the Board, a complainant must serve copies of the complaint and documents on each respondent and each person named in the complaint as someone who may be affected by the complaint.

14. The Board has also from time to time directed pre-hearing production of documents in particular cases. See, for example, *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, at 1732:

....In a number of recent cases involving claims for substantial damages the Board has entertained pre-hearing motions requesting production of documents and greater particularity. In granting these requests, in whole or in part, the Board has relied upon section 103(2)(a).

• • •

Reliance has also been placed on rule 47(3) of the Board's Rules of Practice which provides:

47.-(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

And, in some of these cases, a labour relations officer has been appointed by the

Board to facilitate the exchange of material between the parties and to assist in settlement efforts. Clearly, if such cases are to be litigated fairly and, particularly, if there is to be any chance of settlement, full and frank disclosure by the parties of both the detailed particulars of a damage claim and the documentary evidence that will be relied upon must occur prior to a hearing before the Board.

There are also some recent decisions, made during the course of ongoing hearings, in which the Board has directed that documents be filed with the Registrar, to be made available for inspection by a party's authorized representative in advance of hearing continuation dates, in order to expedite the hearing process and avoid unnecessary adjournments: see, for example, *Forintek Canada Corp.*, [1985] OLRB Rep. July 1050, and *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659. Advance production of documents has also been fostered by means of pre-hearing conferences convened by the Board.

15. It has been the Board's experience that, in appropriate cases, advance production of documents has promoted settlement discussions and expedited the hearing process by minimizing the need for document related adjournments and by enabling parties to narrow the issues in dispute. However, we are also cognizant of the possibility that hearing and deciding issues concerning the proper scope of advance production may delay the disposition of a case. It is clear that the instant case will take a substantial amount of time to adjudicate. Indeed, counsel for the Union has suggested that as many as twenty days of hearing may be required. Although we are not prepared at this juncture to direct production of tape recordings (and transcripts) on which the Union does not intend to rely, we are of the view that it is appropriate in the circumstances of this case to require the Union to produce any tape recordings and transcripts thereof in its possession on which it does intend to rely in these proceedings. This approach will expedite the hearing of this matter without giving rise to problems concerning the adequacy or completeness of production (as it is self-enforcing, in that the Union will be precluded from relying upon any tape recordings and transcripts in its possession which it has not produced). We are satisfied that the Board has the power to direct such production as master of its own practice and procedure under section 102(13) of the Act, which provides, in part, as follows:

The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions....

Moreover, as indicated above, section 103(2)(a) gives the Board the express power to compel production of "such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction".

14. We encourage the parties to these proceedings to *voluntarily* adopt an approach similar to the approach *directed* by the Board in the *Ontario Bus Industries Inc.* case - namely to produce in advance documents in its possession on which that party intends to rely in these proceedings. Such production is in addition to the production which has been directed by the Board. A failure to adopt such a voluntary approach *may* lead to increased "documents related" adjournments. That may in turn necessitate a further ruling from this Board requiring further production or alternatively a ruling which precludes a party from relying upon any document in its possession which it has not produced in advance.

15. Finally, in view of the number of parties and their counsel who reside or have their place of business in or around the City of Thunder Bay, we concur with the oral representations of the I.W.A. and Atway, as well as the written representations received from certain other respondents that the hearing of this matter be convened in Thunder Bay. We have set the following as hearing dates, April 4th, 5th, 6th, 24th, 25th, 26th, May 30th, 31st, June 1st, 6th, 7th, 8th, 20th, 21st and 22nd. Given the expense to the Board and the scheduling difficulties generally caused by convening lengthy hearings outside Toronto, we emphasize again, as we did at the hearing on February 13th, that all parties attempt to facilitate an expeditious hearing of this matter, through full and frank disclosure, particularized pleadings and advance production. If dates in excess of these

fifteen dates are required we will entertain submissions as to the appropriate venue for the continuation of the hearing at the appropriate time.

16. The matter is referred to the Registrar.
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2638-88-R; 2669-88-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, Applicant v. The Butcher Engineering Enterprises Limited, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Trade Union Status - Applicant for certification is expected to correctly name itself - Statements of applicant's affiliations do not belong in the title portion of the certification application - Benefit of s.105 is unavailable to the applicant unless it can show that it is a continuation of one of the organizations previously found by the Board to be a trade union - Ballot box sealed - Applicant will be required to show it is a trade union

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

DECISION OF THE BOARD; February 21, 1989

1. These are two applications for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote.

Board File No. 2638-88-R

2. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application in Board File No. 2638-88-R was made.

3. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken in Board File No. 2638-88-R of the employees of the respondent in the following voting constituency:

All employees of the respondent in the City of Windsor save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

4. All those employed in the voting constituency on February 6, 1989 who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

Board File No. 2669-88-R

5. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent

in the voting constituency hereinafter described were members of the applicant at the time the application in Board File No. 2669-88-R was made.

6. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken in Board File No. 2669-88-R of the employees of the respondent in the following voting constituency:

All employees of the respondent in the Village of St. Clair Beach, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

7. All those employed in the voting constituency on February 8, 1989 who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

Common Issues

8. In each of these two applications, the Registrar wrote to the applicant as follows:

In reviewing the application in the above matter, it appears from a check of the Board's status records that the Board has not found in any previous proceeding that the applicant has been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* under the name of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880.

Our status records indicate that an organization with the similar name of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 was found to be a trade union in Board File #12109-66-R. Your attention is drawn to the following excerpt from *Hartley Gibson Company Limited*, [1986] O.L.R.B. Rep. Nov. 1517: "Section 105 of the *Labour Relations Act* sets up a rebuttable evidentiary presumption of trade union status for organizations that the Board has previously found to be a trade union. Because of the nature of that provision, an applicant in certification proceedings is not entitled to the benefit thereof unless its name is *identical* to that which the Board has previously found to be a trade union. Even a relatively minor difference in name may reflect that an applicant with a name "similar to" or even "substantially the same as" that of an organization previously found to be a trade union is either an entirely different entity or that it has undergone some change which may result in it being a trade union no longer."

If our information is correct, you must be prepared to satisfy the Board in accordance with its usual practice that your organization is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

9. In the letter to the Registrar dated February 8, 1989, counsel for the applicant wrote:

Further to your letters of January 27 and 31, 1989 regarding the correct name of the respondent, I am advised that the correct name of the respondent [sic] is "Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880" and is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

I enclose a copy of the local charter and Section 1 of the by-laws which indicates the correct name of the local.

I have also enclosed a copy of a decision of the Board in Board File No. 1844-88-R, together with a copy of the certificate issued therein. The Board found in Board File No. 1844-88-R that the applicant "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a trade union within the meaning of Section 1(1)(p) of the Act.

Accordingly, the applicant submits that it is entitled to rely on the said Board's decision pursuant to the provision of Section 105 of the Act.

10. The name of the applicant found to be a trade union in Board File No. 1844-88-R was "Teamsters , Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

11. We do not at this stage determine whether the applicant is a "trade union" within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"), nor whether the applicant is entitled to the benefit of the presumption in section 105 of the Act. Those are issues which go to the merits of the application. In an application in which a pre-hearing vote is requested, the merits are not determined until after any vote is conducted and the parties have had an opportunity of a hearing, as contemplated by subsection 9(4) of the Act. However, we do at this stage determine whether the ballots cast in the pre-hearing votes in these applications should be counted before any hearing is conducted. That generally turns on whether the applicant will have to prove something at hearing before it can be found to be a "trade union": see *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316 at paragraph 9.

12. An applicant for certification is expected to correctly name itself in the space for "Applicant" in the title portion of an application for certification. When an applicant places words in that space, that is taken to signify that those words form part of the applicant's name. Everything an applicant writes in that space is taken as being a significant and essential part of the organization's name and not, for example, a collateral statement of its affiliations with or memberships in other organizations. If such collateral statements are necessary at all, they belong in the body of the application, not in its title. Where the name by which an applicant organization describes itself in its application for certification is different from the name under which any organization has previously been found to be a trade union, the benefit of section 105 is unavailable to the applicant unless and until it can show that it is a continuation of one of the organizations previously found by the Board to be a trade union and that the change in name since that finding is not coincident with other constitutional changes which have altered its character: see generally *Coca Cola Ltd.*, [1975] OLRB Rep. Nov. 862; and, *Consumers Distributing Company Limited*, [1981] OLRB Rep. May 509. Thus, where an organization applies under a name different from one under which it has previously been found to be a trade union, it has something to prove at hearing before it will be so found in the new application.

13. For reasons best known to them, some trade unions are not particularly careful to always describe themselves by the name set out in their constitution or bylaws: from time to time they describe themselves by "aliases" consisting of contractions, expansions or approximations of their proper name. Indeed, if counsel's representations are correct, that is what this applicant did in Board File 1844-88-R, since the name under which that application was filed is not the name in Section 1 of the Bylaws enclosed with counsel's letter. An organization which chooses to describe itself differently in different applications for certification can expect to be called upon to show that it is a trade union on each such occasion until all of the "aliases" under which it operates have been the subject of a finding in a Board proceeding.

14. The Registrar has quite properly advised the applicant in this application that it will be called upon to show that it is a trade union. As the applicant is in that position, we follow the Board's ordinary course by directing that the ballot boxes in each of these applications be sealed and the ballots not counted unless and until there has been such a finding.

15. The parties have tentatively agreed on vote arrangements which result in the vote in

one of these applications being conducted before the vote in the other. The respondent had asked that the ballots cast in the first vote not be counted until after the polls closed in the second vote. We would not have been inclined to grant that request, but the question is academic in view of the direction contained in the previous paragraph.

16. The matter of the conduct of the pre-hearing representation votes in these two applications is referred to the Registrar.

1036-87-U Mark Carter and Brad Carter, Complainants v. Sheet Metal Workers' International Association, Local 539, Respondent v. Imperial Insulation & Roofing (1982) Limited, Intervener

Construction Industry - Construction Industry Grievance - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union filing a grievance with the Board alleging that the employer had repeatedly breached the collective agreement - Union considered the litigation to be long, costly and unpredictable - Grievance settled prior to hearing following ratification by a majority of the bargaining unit members - Complainants considering terms of settlement unsatisfactory - Delay of 13 months before filing fair representation complaint - Board declining to inquire further into complaint on the basis of numerous policy considerations - Complaint dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Blake Morrison* for the complainants; *Bernard Fishbein* and *Len Dicker* for the respondent; *Bruce Binning* for the intervener.

DECISION OF THE BOARD; February 20, 1989

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent ("the union") has contravened section 68 of the Act. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The complainants contend that the union contravened section 68 when it settled a grievance on terms which the complainants consider unsatisfactory.

2. A hearing in this matter was held in Toronto on January 9, 1989. On the agreement of the parties, the hearing was confined to a consideration of what was characterized as a "preliminary issue"; namely, whether the Board should exercise its discretion under section 89 not to inquire into this matter because of the nature of the allegations, the relief sought, and the delay in launching a complaint in this forum. The company ("Imperial") was added as a party since it would be affected by the remedy sought by the complainants. The complainant Greg Carter advised the Board that he no longer wished to pursue his allegations, and, accordingly, his name has been deleted from the style of cause.

3. In order to appreciate the issues before me at this stage, it is necessary to sketch in some of the background. The facts are not in dispute and will be reviewed in approximate chronological order.

II

4. The company, as its name suggests, is engaged in the insulation, roofing and water-proofing business. The union represents tradesmen performing such work. The complainants are employees of the company and members of the union. There are about a dozen other employees who would be affected by the remedy which the complainants seek.

5. In or about February 1986, after some investigation, the union concluded that the company was disregarding a number of terms of the collective agreement by which it was bound. The agreement in question is not, nominally, between the union and Imperial. It is between the Roofing Employer Bargaining Agency of the Ontario Industrial Roofing Contractors' Association and the Built-Up Roofers Damp and Waterproofers Section of the Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers International Association. However the union's position was that Imperial was bound by this agreement and by its predecessors.

6. It is unnecessary to set out in detail the extent of the alleged employer violations of the collective agreement. It suffices to say that, in the union's submission, the company had totally disregarded, or only sporadically applied, numerous terms of the agreement respecting: the classification and use of union members; the employment of subcontractors; the payment of hourly rates, overtime rates, vacation pay and statutory holiday pay; the payment of premium rates or allowances for lunch breaks, weekend work, days lost through inclement weather, and so on. In short, the union was asserting multiple violations of the collective agreement which might, *if proved*, involve significant financial liability. I use the term "if proved" because, according to the complainants, the employees were not even aware of the alleged breaches of the collective agreement until late 1985, so that it might have been very difficult for the employee complement to reconstruct the pattern of wages, benefits, special allowances and payments to which they would have been entitled had the terms of the collective agreement been faithfully followed. In any event, the union filed what was described before me as a "kitchen sink" policy grievance on behalf of those employees, asserting multiple violations of the collective agreement and demanding compensation.

7. In accordance with section 124 of the *Labour Relations Act* the union's grievance was brought before the Labour Relations Board. As is often the case, the parties met prior to any scheduled hearing to explore the possibility of resolving their dispute without resort to what would necessarily be protracted and expensive litigation.

8. From the union's perspective, the company had been disregarding the terms of the collective agreement to the detriment of its members. But the company was not without arguments of its own. The company's position was that the union was estopped by its conduct from relying upon the strict enforcement of the terms of the collective agreement. Not only had there been acquiescence, for some time, in the manner in which the agreement was being applied, but, in addition, the company asserted that there had been a representation from a former business agent that, because of the company's economic situation, it would be granted some relief from strict adherence to the contract terms. This, the company argued, not only fed the estoppel argument but would permit the company to rely upon a so-called "hardship clause" which allowed firms in financial difficulty, or difficult competitive circumstances, to operate at less than the stipulated terms and conditions of employment.

9. The company also took the position that at least some of the work in question was not

“construction work” at all, but rather “maintenance” and therefore both beyond the terms of the collective agreement and beyond the jurisdiction of the Board to consider under section 124 of the Act. The company asserted that insofar as the employees were engaged in these “non-construction” activities, they had no claim at all, and certainly not one which could be pursued before the Board under section 124 of the Act. The company also pointed out that, in accordance with the terms of the agreement, an employee had only two working days to complain that s/he was being improperly paid or otherwise dealt with contrary to the terms of the collective agreement. None of the employees had ever complained about a shortfall in their pay and, in the company’s submission, it was too late to do so now. An arbitrator - be it the Board or someone privately selected - could not simply “roll back the clock” as the union submitted should be done.

10. Finally, from the union perspective, there was some residual doubt about whether the union would be able to satisfactorily prove the document tying the company in to the above-mentioned collective agreement. If the union failed on this point, the grievance would not only be dismissed, on its merits, but bargaining rights would be erased as well. Obviously, counsel for the union did not share his concern with his employer counterpart, but it remained a potential difficulty.

11. In summary, then, whatever the “justice” or legal validity of the union/employee position, the path of litigation was likely to be a long and costly one, with results that were problematic and unpredictable. While it may seem unfair that massive violations of a collective agreement are more difficult to sort out, prove, and remedy than simple ones, that is an unfortunate collective bargaining reality.

12. The hearings before the Board were scheduled to begin on June 4, 1986. In May 1986, however, the union and employer reached a settlement of the matters in dispute. That settlement included a formal acknowledgment that the company was bound by the collective agreement and would thereafter adhere to its terms, and the payment of \$10,000.00 for distribution among the company’s employees. This settlement was made subject to ratification by the employees potentially affected by it.

13. A meeting to consider the proposed settlement was held on June 16, 1987. Counsel for the union was present to explain the legal and tactical situation, the issues involved, and the likelihood of success. A vote was taken. Fourteen members voted in favour of the proposed settlement. Four voted against. Two of those objectors are the complainants in this matter. It should be noted that even *before* the meeting the complainants had taken legal advice as to their position and the course(s) of action open to them if the settlement was accepted by the union and their fellow employees.

14. Since more than 75% of the employees had voted in favour of the proposed settlement, the union decided to accept it. Following the execution of formal minutes of settlement, the monies mentioned were paid and distributed. There is no allegation that, thereafter, the company did not adhere to its part of the bargain. The complainants did not accept their share of the compensation fund.

15. On June 20, 1986, in accordance with the terms of the above-mentioned settlement, the trade union requested leave to withdraw its policy grievance. By decision dated June 25, 1986 the Board granted that request. Shortly thereafter counsel for the trade union explained the situation to counsel for the complainants and sent some documents which were requested. However, neither Mark Carter nor Brad Carter made any immediate complaint against the trade union. They did not take the money available to them pursuant to the settlement but neither did they move, in this

forum, to challenge its validity. Instead, on the advice of their counsel, they filed a civil action against the company for an accounting and the payment of wages owing.

16. On September 25, 1986 the company moved, in Court, for a dismissal of the complainants' action on the grounds that there was no legal basis for it. By decision dated November 25, 1986, a judge of the Supreme Court of Ontario concluded that the action should be dismissed. While the reasoning of the learned Judge was not put before me, he presumably ruled, (in accordance with the well-established law in Ontario), that there could be no action by an individual employee based upon disputed terms of a collective agreement (see generally: G. W. Adams, Q.C. *Canadian Labour Law: A Comprehensive Text* (1985) Canada Law Book).

17. About a week later, in a letter dated December 5, 1986, the complainants' solicitors expressed the opinion that the complainants should consider launching a proceeding before this Board alleging that the union had breached its statutory duty of fair representation. I observe that such possibility would or should have occurred to the complainants, if properly advised, in May or June 1986 when the settlement was concluded and they were already receiving legal advice. But it was not until July 1987 that the complainants' solicitors filed this complaint, alerting the trade union and employer, for the first time, that the settlement reached 13 months before was now under attack.

18. Counsel for the complainants contends that in the period December 1986 to July 1987 there may have been some "misunderstanding" about the complainants' desire to proceed (Greg Carter ultimately decided not to do so). The fact remains however, that there was a delay of almost 13 months before the respondent union was put on notice that its conduct was said to be illegal, by which time the grievance had long since been put to rest, monies had been distributed to other employees, the issue of bargaining rights had been acknowledged, and a *new* collective agreement had been negotiated. The complainants' refusal to accept their share of the settlement does *not* signal any assertion, on their part, that their bargaining agent has contravened the *Labour Relations Act*. At most, it indicates a desire not to prejudice the civil action which they then believed was open to them.

19. There follows a period in which the Board sought to accommodate the hearing schedules of the parties' solicitors. Two scheduled hearing dates were adjourned on consent. The second adjournment was coupled with a request that no hearing date be set except in consultation with counsel and the advice that the complainants and their counsel would not be available until the new year (1988). In early January the Registrar of the Board wrote to the parties asking for information on dates when they would be available. The trade union submitted 14 such dates, the company 5, and the complainants 4 consecutive days in March, but only those. On January 26, 1988 the Registrar wrote to the parties to advise that there was no overlap of the dates when they were available and urged them to seek March dates which would be agreeable and which would then be confirmed. There were none; nor was there any communication from any of the parties for months. For whatever reason, no one seemed anxious to proceed with this matter. It was only after a letter from the Deputy Registrar of November 4, 1988 that the complainants' counsel indicated that he was instructed to proceed. A hearing day scheduled for December 20, 1988 was adjourned, on consent, and, as I have already noted, the matter came on for hearing before the Board on January 9, 1989.

20. Having set out the way in which this matter developed, it may be useful to record what the complainants seek as a remedy. The complainants assert that the settlement was improvident and should now be set aside. They assert that the settlement process undertaken by the union and confirmed by their fellow employees was in fact, "arbitrary", "discriminatory" or influenced by

“bad faith”. The complainants demand that the trade union file a *new grievance* on their behalf claiming compensation *back to 1981* - that is, not only under the 1984-86 agreement, but also under two previous collective agreements. The complainants urge the Board to set aside or nullify any time limits or other legal impediments to the processing of such new grievance, and not to permit any settlement of such grievance without their specific consent. It would follow, of course, that this proposed remedy might well require restitution of any monies paid to the workers pursuant to the settlement reached in 1986, and, as well, restoration of the company to its previous legal position in respect of any defences which might have been open to it. As before, the onus would be upon the grievors to establish and prove all elements of their claim under whatever collective agreement it might be brought. I make no comment, at this stage, about whether, as a remedy in an unfair representation complaint, a complainant can successfully assert a right to veto what might otherwise be an objectively reasonable settlement; (however, in this regard, see *Jean Liebman*, [1987] OLRB Rep. July 1011).

21. The argument of the union (supported by the company) is that it is now too late to unravel the settlement fashioned by the bargaining parties in 1986 and ratified by the overwhelming majority of the employees in the bargaining unit. The union notes that the complainants had counsel as early as June 1986, *before* the ratification vote, but no allegation against the union or challenge to the settlement terms was mounted until some 14 months later. The union was not a party to the unsuccessful civil action, and could not reasonably foresee that its conduct respecting the ratified settlement would be challenged as a breach of section 68 of the Act. Nor could the company reasonably anticipate that, having established that the civil action was without legal foundation, its position would be challenged, indirectly, through the medium of an alleged violation of section 68 of the Act.

22. The grievance under review is now three years old. The settlement ratified by the overwhelming majority of the employees is now two and a half years old. Yet the complainants seek to extend that grievance, with its attendant legal and evidentiary difficulties, back to 1981 - based ultimately on collective agreements which all provide that alleged violations must be raised *within two days* of the event giving rise to the grievance. Such time limits are obviously not binding upon me or an arbitrator (see section 44(6) of the Act), but in the fluid employment and economic context of the construction industry, it is significant that both the trade union and employer have agreed that violations of the collective agreement should be dealt with expeditiously. That policy thrust is also echoed in section 124 of the *Labour Relations Act* which requires the Board to hold a hearing within 14 days of the filing of a construction industry grievance.

23. Here the new grievance, sought by the complainants by way of remedy, is based upon events going back to 1981, and relies upon at least two prior collective agreements which have long since expired. It would necessarily raise all of the legal and evidentiary problems evident in the 1986 grievance, together with any additional issues which might be associated with the complainants' claims for the period 1981-86 under the two previous collective agreements. From the company's perspective, if the complainants' claim before me is successful, and the settlement is set aside, it will be free not only to claim recovery of any monies paid pursuant to that settlement but will also feel free to assert all of the defences otherwise available to it and to put the union, the complainants, and their fellow employees to the strict proof of any sums to which they might claim to be entitled. To the extent that the work in question, over the years, is not construction work, or is not covered by the collective agreement, or the employees cannot prove their entitlement to payments provided by the collective agreement, or there is an estoppel, or the claim cannot be maintained in respect of agreements long expired, or there were no bargaining rights in the first place, or the claim is barred by the time limits in the collective agreement itself, there would be no recovery at all, or only limited recovery payable only after months or years of litigation. In the mean-

time, there would be significant disruption to the parties ongoing bargaining relationship and both the rights and expectations of the other employees in the bargaining unit.

24. Section 89 of the Act clearly gives the Board a discretion whether or not to inquire into an unfair labour practice complaint (see *Re Dhanota and International Union United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.), Local No. 1285*; and *Sheller-Globe of Canada Ltd.*, (1983) 42 O.R. (2d) 73 (Ont. Div. Ct.)); and in quite a number of cases the Board has declined to inquire into complaints which were not filed in a timely fashion. Here I will refer to only one. In *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420 the Board made these observations:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once chrystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of accordng a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it, when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

[To the same effect see also, for example: *Sheller-Globe Ltd.*, [1982] OLRB Rep. Jan. 113; *Waterloo Metal Stampings Ltd.*, [1984] OLRB Rep. Jan. 156; *Conestoga College of Applied Arts & Technology*, [1983] OLRB Rep. June 882; *Nelson Quarry*, [1983] OLRB Rep. Sept. 1531; *Tecumseh Products of Canada Limited*, [1985] OLRB Rep. Jan. 123; *Norman F. Stroesser*, [1986] OLRB Rep. May 684; and *Michael Baranowski*, [1987] OLRB Rep. May 645.] The fact that a

complainant may be acting upon his solicitor's advice in pursuing other remedies against other parties in other forums may *explain* a tardy complaint under the *Labour Relations Act* but does not necessarily *justify* it - particularly when the complainant, being unsuccessful in those other forums, changes "targets" and seeks relief under the Act against a new party whose behaviour was previously not the subject of complaint. Indeed, from the perspective of the new respondent, it matters little that the reason for the delay is that the complainant was unsuccessfully pursuing legal remedies against someone else.

25. In the instant case, the validity, application, and alleged violations of the collective agreement were all settled in June 1986 to the apparent satisfaction of the vast majority of the company's employees. While the complainants were dissatisfied with that settlement, they took no action calling *the union's* conduct into question until some 13 months later; moreover, from the outset, they were acting with legal advice, and their refusal to take their share of the settlement monies is as consistent with protecting their position in the civil action as any other explanation. Certainly there was no express attack on the union's judgement in settling the grievance, and even when their solicitors specifically noted the possibility of action against the trade union (which presumably they should have raised before-at least as a possibility), there was a further seven months delay before this complaint was actually filed. Meanwhile, the union, the employer and the other employees in the bargaining unit were all operating on the assumption that the grievance had been settled, the collective agreement was now binding in accordance with its terms, and, in fact, a new agreement for the period 1986-88 was negotiated and applied. By this complaint, the grievors seek not only to overturn the settlement and reopen all previously-settled issues, including those concerning estoppel, the scope of the agreement, and bargaining rights, but also to pursue their claim back to 1981 under collective agreements long expired (assuming that they were applicable in the first place). And this claim is made in the context of the construction industry where the bargaining parties and the Legislature have both recognized the importance of resolving disputes quickly. Finally, while the nominal respondent in this matter is the trade union, there is little doubt that the real target is the company, and section 68 became the legal vehicle of choice only after the failure of the complainants' civil action - and even then only after another delay of some months.

26. In my view the policy considerations enunciated in the *Mississauga* case are applicable here. Had the complainants sought to attack the union's position and overturn the settlement at the time it was made, their allegations might have warranted consideration on the merits (although even then, they would have to show that the union's position, ratified by the employees affected by it, was "arbitrary", "discriminatory", or "in bad faith"). Here, however, there is a delay of 13 months during which time the settlement has been implemented, the collective bargaining relationship has continued based upon the understandings and undertakings of June 1986, and a new collective agreement has been entered into. I see no reason, at this stage, to inquire into a tardy complaint reopening matters long settled and potentially putting in jeopardy, for the complainants and others, the very bargaining rights upon which they must ultimately rely for their claim to be successful. Nor, at this stage, would it make it any "labour relations sense" to canvass legal rights and obligations, including estoppel issues, under collective agreements long expired - assuming, without finding, that the Board or an arbitrator was even entitled to do that.

27. For the foregoing reasons the Board exercises its discretion not to inquire further into this complaint. The complaint is therefore dismissed.

1953-88-R Labourers' International Union of North America Local 837, Applicant v. **Covello Brothers Limited**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 38, Intervener

Certification - Construction Industry - Intimidation and Coercion - Membership Evidence - Unfair Labour Practice - Employer alleging that union threatened employees with closing down the job unless they signed cards - Improper comments which could arguably cause employees to be concerned about their continued employment made by rank-and-file employee as part of his "salesmanship" of the union not leading Board to question the voluntariness of the membership evidence filed - Misrepresentations made by union official immediately clarified by same official the next day - Membership evidence voluntary - Certificate issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *M. Eayrs* and *J. Redshaw*.

APPEARANCES: *L. Steinberg* and *N. Scibetta* for the applicant; *B. W. Adams* and *R. Covello* for the respondent; *David McKee* and *Arthur Varty* for the intervener.

DECISION OF THE BOARD; February 9, 1989

1. This is an application for certification which relates to the construction industry. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the *Labour Relations Act*.

2. In a letter to the Board dated November 25, 1988, counsel for the respondent employer alleged the following improper or irregular conduct on behalf of the applicant union:)

On or about Monday October 31, 1988 the Applicant's organizer, Mr. Nicolo Seibetta [sic], met two of the Respondent's employees, Graham Scott, and Ken White on the respondent's job site. He told them if they didn't sign union cards he would picket the job and "close it down until they either signed union cards or they were replaced with union labour working on the job". The employees in question came to the view that their continued employment was in jeopardy if they did not sign union cards.

This letter was referred to in paragraph 13 of the respondent's reply. In addition, the United Brotherhood of Carpenters and Joiners of America, Local 38 ("Carpenters' Local 38") filed an intervention in which it alleges that it is the bargaining agent of employees who may be affected by the application.

3. As a result of the respondent's allegations and the intervention filed by the Carpenters' Local 38, the Board directed that a hearing of the Application for Certification be convened. The parties were duly notified of the date, time, place and purpose of the hearing. On the day first scheduled for the hearing the parties met with the Labour Relations Officer and were able to agree upon a number of matters. The parties agreed upon an appropriate bargaining unit description. Having regard to that agreement, the Board finds that all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand (Board Area 5), save and except non-working foremen and persons above the rank of

non-working foreman constitute the unit of employees of the respondent appropriate for collective bargaining.

4. The parties further agreed, and requested that the Board note their agreement in its decision, that the intervener had no status to intervene in this application. In this regard we note that the parties are agreed "that the persons who are the subject of this application were not employed as carpenters or performing carpentry work on the application date. The intervener asserts it has a collective agreement with the respondent in the ICI sector and that it holds bargaining rights for carpenters and carpenters' apprentices in all other sectors in Board Area 5. The respondent disputes these assertions. However, on the basis of the facts set out above in respect of the persons who are the subject of this application, the parties agree that the intervener has not status to intervene in this application."

5. After these matters had been brought to the attention of the Board, and after the Board indicated to the parties that we would incorporate their agreement into the decision of the Board in this matter, counsel on behalf of the intervener withdrew and did not participate any further in the hearing.

6. At the commencement of the hearing into the allegations raised in the letter dated November 25, 1988, counsel on behalf of the respondent employer clarified the particulars of irregular and improper conduct. Counsel indicated that it was Mr. Edward Trottier, one of the respondent's employees, and not Mr. Nicolo Scibetta, the applicant's organizer who had told certain employees that if they did not sign union cards the union would picket the job site, and close it down until employees either signed union cards or were replaced with union labour. Counsel indicated however, that the respondent continued to assert and allege that Mr. Scibetta had made threats directly to the employees that their continued employment was in jeopardy if they did not sign union cards. We proceeded with the hearing on that basis.

7. The facts surrounding these allegations are somewhat unique and unusual. Over the course of the two days of hearing in this matter we had the benefit of hearing the evidence of each of the four persons who are alleged to have been employed by the respondent in the bargaining unit at the relevant time. In addition we heard the evidence of Mr. Nicolo Scibetta, the business agent of the applicant union, and Mr. Richard Covello, the Vice-President and General Manager of the respondent employer. Having regard to the evidence of these six witnesses the facts relevant to our determination are summarized as follows.

8. On Monday, November 14, 1988, Covello Brothers Limited ("Covello Brothers" or "the employer") was engaged on a construction project in the Quaker Road and Welland Road area of the City of St. Catharines. Towards the lunch hour, Mr. Scibetta attended at the site and spoke to Graham Scott and Ken White two of the labourers employed at that site on that day. He spoke with each of these two men on an individual basis and in the privacy of his car.

9. Mr. Scibetta first spoke with Graham Scott. He introduced himself as a union representative and presented Mr. Scott with "some paper work" which was an application for membership to join the union. While Mr. Scott was filling out the application, Mr. Scibetta made reference to the fact that the employees should have been in the union. Mr. Scott did not remember if Mr. Scibetta made any comments which indicated that Mr. Scott was *required* to sign the application forms. Mr. Scott however did get the impression from the conversation that the employees *should* have been unionized, and that if he did not join the union it would "be bad for the company". The conversation between Mr. Scibetta and Mr. Scott lasted approximately five minutes. Mr. Scott testified that he paid little attention to the conversation which went "in one ear and out the other." He did recall that Mr. Scibetta "said something like we might not be working here tomorrow" but

left Mr. Scott to draw his own conclusions from that remark. Mr. Scott is a recent immigrant to Canada from the United Kingdom. He has had little experience with the trade union movement in Canada. As such he was "a bit daunted by the way the union got on the site" because "it was different from what [he] had experienced." Mr. Scott did sign the application for membership that day.

10. Mr. Scibetta next spoke to Mr. Ken White. Mr. Scibetta also presented Mr. White with an application card and requested Mr. White to sign the card. During the course of the five to ten minute conversation with Mr. White, Mr. Scibetta made a comment to the effect that if Mr. White did not sign the application to become a union member he would not be working at the site in the morning. Mr. White signed the application for membership that day.

11. We note at this point that from the totality of the evidence we have concluded that when Mr. Scibetta approached the employees on November 14, 1988, he was under the impression, and as a result conveyed to the employees his impression, that Covello Brothers had already been organized by the applicant trade union and as a unionized contractor was bound to recognize the applicant and employ only members of the applicant. As a result, Mr. Scibetta conveyed to the employees that they *had* to become members of local 837 "according to the commitment [we] had between local 837 and Covello Brothers."

12. Mr. Scibetta's attendance at the site on November 14, 1988 was not wholly unexpected by Mr. Scott or Mr. White. A third employee, Mr. Edward Trottier had for several weeks preceding November 14, 1988 spoken to these two men about joining the union. Mr. Trottier had himself applied to join the union in mid October, 1988. Mr. Trottier had attended at the local union office and had spoken to Mr. Scibetta. At that time Mr. Scibetta asked him who he worked for, and, upon being told that Mr. Trottier worked for Covello Brothers, advised Mr. Trottier that he thought Covello Brothers was unionized, that he would look into the matter but that, because Covello Brothers was already a unionized contractor, Mr. Trottier's initiation fees would be \$300.00.

13. After he had joined the union, Mr. Trottier spoke often about the union to his fellow employees. He also indicated to them that he thought Covello Brothers was already a unionized contractor. Mr. Trottier actively encouraged his fellow employees to become union members. In addition to emphasizing the benefits of unionization such as higher wages and better benefits, Mr. Trottier also attempted to encourage the other employees to join the union by advising them that if they did not join the union, the union would probably picket the job sites, and "shut the job down" because the company was employing person who were not union members. Mr. Trottier attempted to explain these remarks to the Board by indicating that he was under the impression that his employer was already unionized, and bound to recognize the applicant trade union as the bargaining agent of the employees. Mr. Trottier made similar comments regarding picketing of the site to Mr. Richard Covello when Mr. Covello spoke to the employees about the union.

14. Notwithstanding Mr. Trottier's "salesmanship" neither Mr. White nor Mr. Scott was desirous of joining the union, particularly if the costs of joining was \$300.00. For this reason, and notwithstanding Mr. Trottier's urging to the contrary, neither man took the initiative to go to the union hall to join the union. In light of Mr. Trottier's conversations however, each man was expecting a union representative to show up at the job site. Neither was therefore particularly surprised when Mr. Scibetta gave to them applications for membership. In fact, when Mr. Scott spoke to Mr. Scibetta on November 14, he was concerned about the cost of joining the union as he did not have \$300.00. Mr. Scibetta told him that the initiation fees would be deducted weekly from his pay-cheque.

15. Before we turn to examine the remainder of the facts and circumstances we wish to address respondent counsel's argument as they relate to Mr. Trottier's comments. First, we note that, notwithstanding Mr. Trottier's explanation, the comments by Mr. Trottier were misleading and wholly inappropriate. In certain circumstances they could be viewed as intimidation and coercion and could be viewed as a threat to the employees and their continued job security. Certainly comments such as these, if made by a responsible union official, would normally cause the Board to inquire into the voluntariness of the membership evidence filed.

16. In the present circumstances however, there is no evidence that Mr. Scibetta or any other union official instructed Mr. Trottier to make those comments to the other employees. There is no evidence that Mr. Scibetta made any such comments or in any way threatened the employees that the union would picket the job site or shut the job down if they did not join the union. There is no evidence that the employees to whom Mr. Trottier made these comments were told by Mr. Trottier that Mr. Scibetta had told Mr. Trottier, that he would do these things if the other employees did not join the union. The evidence is to the contrary. Mr. Trottier made the threats about picketing and job shut down on his own. Counsel has asked us to draw an inference that the information which the employees received about picketing, job shut down, and the consequent loss of employment, did in fact originate with Mr. Scibetta and were matters that were communicated to the employees by Mr. Trottier at the behest of, or with the authority of Mr. Scibetta. Counsel asked us to draw such an inference primarily because of the evidence of Mr. Covello. Mr. Covello testified that Mr. Scibetta himself made similar comments to Mr. Covello during a telephone conversation between the two men on November 14th. Mr. Scibetta denies making any such statements to Mr. Covello. We need not determine whether Mr. Covello's or Mr. Scibetta's recollection of what was said between the two men during their telephone conversation is more accurate. In view of the direct, uncontradicted evidence of Mr. Trottier that he "did not say that the business agent had said that to [him]" to the other employees, and the direct, uncontradicted evidence of Mr. Scott and Mr. White that Mr. Trottier did not say anything to them to indicate that the union representatives had told him that the union would picket at the sites, we are not prepared to draw such an inference.

17. What we are left with therefore are improper and inappropriate comments which *could* arguably cause employees to be concerned about their continued employment. These comments however were made by a rank and file employee to his fellow employees as part of his "salesmanship" of the union to his peers. The Board has in the past distinguished between statements made during an organizing campaign by rank and file employees who are not in a position to try and achieve the consequences of the statements made by them, and persons who either have, or are perceived to have, the role or the authority to bring about the consequences of such statements. (see for example *Crenmar Services Limited* [1978] OLRB Rep. Jan. 48 and generally the discussion of this topic in *Sack and Mitchell* at pages 192/196). Having regard to the totality of the evidence, including the evidence relating to the nature of these statements, the position of Mr. Trottier and the time and place and surrounding circumstances, we are of the view that a reasonable employee of ordinary convictions would not be influenced, affected, threatened or intimidated by Mr. Trottier's statements. As Mr. Scott said, "[we] took what he was saying [about joining the union] with a pinch of salt."

18. After Mr. Scibetta spoke with Mr. Scott and Mr. White on November 14, 1988, he returned to the union office and telephoned Mr. Covello. Much of what transpired during the course of that telephone conversation was irrelevant to our determination of the issues in this matter. The relevant portion of the evidence in respect of this telephone conversation however is that during the call Mr. Scibetta conveyed to Mr. Covello that he had been at the job site, had ascertained that persons not members of the applicant union were employed by Covello Brothers, had

signed up those employees, and that he was aware that Covello Brothers was not paying its employees the rate in the "current" collective agreement. During the conversation, Mr. Scibetta was clearly under the impression, and asserted to Mr. Covello, that Covello Brothers was an unionized contractor and bound to recognize the applicant union as bargaining agent and abide by the provisions of the collective agreement. These matters therefore caused Mr. Scibetta some concern. We accept Mr. Covello's evidence that during the course of the conversation, Mr. Scibetta also conveyed that one of the purposes of his calls was to have Mr. Covello sign the current "local" collective agreement.

19. For his part, during this telephone conversation Mr. Covello asserted that Covello Brothers was not at that time a unionized contractor because, although the company used to be unionized, in effect the union had abandoned its bargaining rights. Mr. Covello indicated that in his opinion Covello Brothers was not bound to recognize the applicant as bargaining agent of the employees, and was not in as contractual relationship with the applicant as the last collective agreement between the parties had expired at least eight years previous. Moreover, it was his position that even if Covello Brothers was bound to recognize the union it was not in violation of any of its contractual obligations as the rates and benefits it was paying to its employees were well above those found in the expired collective agreement. In the end, nothing was resolved during this conversation.

20. Mr. Scibetta testified that the information which he received from Mr. Covello that Covello Brothers was not an unionized contractor took him by complete surprise. He had always considered Covello Brothers to be an organized company because he was aware of the fact that for several years Covello Brothers had regularly remitted health and welfare contributions on behalf of two of its employees Felice and Nicola Terrigno. (In fact, the evidence of Mr. Covello was that such remittances had been made by the employer on behalf Nicola Terrigno until March 1984, and on behalf of Felice Terrigno until March 1987.) As result of the information he received from Mr. Covello, Mr. Scibetta immediately called the union's head office in Hamilton, Ontario. He was advised by personnel there that the last collective agreement which the union had with Covello Brothers was signed on November 10, 1972 and had expired March 31, 1973. It was therefore the opinion of the union's head office personnel that under such circumstances it would be difficult for the union to continue to assert its bargaining rights. Mr. Scibetta was advised that Covello Brothers was no longer bound to any collective agreement nor was it bound to recognize the union as bargaining agent for its employees. He was further advised that if he wished to reorganize Covello Brothers, he would have to file an application for certification.

21. Armed with his newfound knowledge, Mr. Scibetta again attended up the job site the next day, November 15, 1988. There he spoke with all of the employees, on both an individual basis as he was waiting for the group to gather, and then again as a group. He advised the employees that he had made a mistake and that in fact Covello Brothers was no longer bound to recognize local 837 and was no longer a "union" company. He told the employees that because the company was not unionized, he would have to reorganize the company and file an application for certification. He indicated that if the employees wanted to be represented by the union he was willing, and hoped that employees would give him the opportunity, to file an application for certification. He explained that in order to do this he would require a \$5.00 initiation fee from each of the employees. Both Mr. Trottier and Mr. Simpson, the flag man at the site on that day, confirmed Mr. Scibetta's evidence. Mr. Scott also recalled Mr. Scibetta using words such as certification and recertification. Mr. White's memory of that conversation was very vague and imprecise.

22. During the course of this conversation no employee objected to paying the \$5.00, nor did any person make any comments which would indicate that he did not want union representa-

tion. Indeed, Mr. Scott's testimony was to the effect that although he did not fully comprehend the situation, he clearly understood that in signing the application he was becoming a member of the union. After he had paid the \$5.00 he specifically confirmed with Mr. Scibetta that he was now a member of the union. Each of the four employees paid to Mr. Scibetta the required \$5.00 initiation fee. An application for certification supported by membership evidence which consisted of an application for membership together with a separate receipt indicating payment of \$5.00 on account of initiation fees was subsequently filed by Mr. Scibetta. A statement of desire or a petition in opposition to that application was not filed with the Board by any person in the bargaining unit.

23. The payment of the \$5.00 on November 15, 1988 by each of the employees, after Mr. Scibetta had explained the situation, formed the crux of applicant counsel's submissions at the conclusion of the evidence. Counsel submitted that we had the benefit or "luxury" of hearing the evidence of each of the persons in the bargaining unit who had joined trade union and had paid the required \$5.00. In his submission that evidence disclosed that the employees signed the membership applications on November 14, 1988 because, for various reasons unrelated to any actual or perceived threat to their job security, the employees desired union representation and the benefits they thought that such representation would bring. Their wishes in this regard were confirmed the following day with the payment of the \$5.00. He submitted that, at that point each employee was aware of all the facts and circumstances; was aware that Covello Brothers was not an unionized employer; and was aware that in order to become unionized it would be necessary for the employees to pay the \$5.00 initiation fee to permit Mr. Scibetta to file an application for certification. He submitted that the \$5.00 payment was made voluntarily because the employees wanted the union to represent them. Moreover, the payment was made at a time when any misapprehensions or mistakes about the status of the company vis-a-vis the union, or the "requirement" that employees of Covello Brothers be members of the applicant union had been "cured" and fully explained to the employees. According to counsel, the fact that no petition in opposition to the union's application had been filed supported his assertion that employees were not, and did not feel threatened, intimidated or coerced when they signed union application forms and paid the \$5.00.

24. Counsel on behalf of the employer on the other hand submitted that the circumstances surrounding first the signing of the applications and next the "curing" of the misrepresentations and the payment of \$5.00 by employees ought to be viewed from a much different perspective by this Board. He submitted that whether on November 14, 1988, Mr. Scibetta actually believed that the union had existing bargaining rights to represent employees at Covello Brothers, (a proposition which he submitted was improbable, as was a suggestion that a business agent had no knowledge of the currency of the collective between the parties) was irrelevant. The statements made by Mr. Scibetta to the employees on November 14, were improper and irregular and thus tainted the voluntariness of the membership evidence obtained on that day. Counsel submitted Mr. Scibetta's comments that the employees might not be on the job the next day threatened the job security of the employees and were intimidating and coercive. Those threats were not, and could not be "cured" by Mr. Scibetta's statements on the 15th.

25. Moreover, counsel submitted that the payment of \$5.00 on November 15, should also be viewed in the context of the totality of the facts and circumstances which then existed. Counsel submitted that the \$5.00 initiation fee required on November 15, 1988, following so closely on the heels of the union's previous assertion that it would cost \$300.00 to join the union was an "inducement". Counsel submitted that this "inducement" coupled in the same time frame as the threats to continued employment should, at a minimum, cause the Board to doubt whether the membership evidence filed was a true expression of the wishes of the employees so as to require that the wishes of the employees be ascertained by way of a secret ballot representation vote. It was his submission

that the membership evidence was clouded by the surrounding circumstances. Counsel referred to the circumstances surrounding the \$5.00 initiation fee as the “mirror image of the Alex Henry situation” (see *Alex Henry & Son Limited*, [1977] OLRB Rep. May 288).

26. Having regard to the evidence of the various witnesses who referred to the \$5.00 initiation fee in such terms as “it was a blessing to them that the cost was only \$5.00 instead of \$300.00”, it was “a deal”, and considered an “early Christmas present” we concur with counsel’s characterization that the initiation fee was indeed an inducement. We do not view the inducement as being improper however, nor do we consider the circumstances to be intimidating, coercive or threatening. Many trade unions customarily reduce their initiation fees for the purpose of organizing employees. This type of two-tier initiation fee structure in and of itself does not necessarily violate the *Labour Relations Act*. In this regard we adopt the reasoning of the Board in *Leons Furniture Limited*, [1982] OLRB Rep. Mar. 404 where the Board indicated that it would not, as a matter of course order a representation vote every time there was some confusion over union security or initiation fees or dues.

27. Having regard to all of the circumstances and the evidence before the Board we have determined that the membership evidence filed is a true and voluntary expression of the wishes of the employees. It is membership evidence which is qualitatively and quantitatively sufficient to support the union’s entitlement to be certified as the bargaining agent of the employees in the bargaining unit. Any misapprehensions, mistaken beliefs or misrepresentations caused by Mr. Scibetta’s initial mistake and approach to the employees based on his erroneous views that Covello Brothers was an employer already bound to recognize the applicant, was immediately rectified, clarified and explained by Mr. Scibetta as soon as he became aware of the correct facts. If there was any hint of intimidation or coercion on the part of Mr. Scibetta when he approached the employees on November 14, and we make no finding that there was, that was immediately recanted by the *same* union official on November 15. From the totality of the evidence we have concluded that when the employees signed the application cards, and when they subsequently paid the \$5.00 initiation fee and signed the receipt for same, the employees were aware of the nature and purpose of the membership applications and the \$5.00 payment. They were also aware that Mr. Scibetta required such documentation and the payment of fees to file an application for certification. They also knew that without these two actions on their part, the signing of the form and the payment of \$5.00, they would not be “unionized” and Covello would not be a union contractor.

28. On the basis of the evidence before us we are satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 25, 1988, the terminal dated fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. We note that prior to the hearing of the evidence in respect of the allegations raised in counsel’s letter dated November 25, 1988, the Board dealt with a challenge by the applicant trade union to the list of employees filed by the respondent. The applicant stated that Mr. Edward Simpson should be added to the list. It was the applicant’s position that Mr. Simpson was employed as a construction labourer and more specifically as a flag man, on the date of application and was properly included in the bargaining unit. The respondent disputed this position and asserted, *inter alia*, that Mr. Simpson was not an “employee” of the respondent but was an employee of an employment agency which on occasion provided “temporary” help to the respondent. The parties agreed that the Board should not conduct an inquiry into the employment status of Mr. Simpson. They anticipated that through further discussion, they might be able to resolve this issue. The parties further agreed that, if they were unable to resolve the matter, the Board ought to appoint a

Labour Relations Officer to conduct an inquiry into the employment status of Mr. Simpson and to report to the Board. The Board has determined that the applicant's rights to certification cannot be affected by the Board's ultimate determination as to whether Mr. Simpson was or was not an employee in the bargaining unit on the date of application. We are satisfied that in either event more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant at the relevant time. Having regard to the agreement of the parties, the Board hereby consents to adjourn the appointment of a Labour Relations Officer *sine die*.

30. A certificate will issue to the applicant.

1363-87-R; 1928-87-U Retail, Wholesale and Department Store Union, AFL:CIO:-CLC:, Applicant v. **Cuddy Food Products Ltd.**, Respondent v. United Food and Commercial Workers' International Union, Local 175 and United Food and Commercial Workers' International Union, AFL-CIO-CLC, Interveners; John Henson and 25 others, Complainants v. United Food and Commercial Workers' International Union, AFL-CIO-CLC, United Food and Commercial Workers' International Union, Local 175 and Cuddy Food Products Ltd., Respondents; Deb Johnston and others, Interveners

Damages - Parties - Practice and Procedure - Reconsideration - Unfair Labour Practice - Complainants arguing that Board erred in awarding damages only to the complainants - Argument that damages should be afforded to all employees affected by the breach of the Act dismissed - A complainant must have the authority to represent the grievors' interests - Complainants gave no indication during the proceedings that they were authorized to make a complaint on behalf of any other employees - Reconsideration application dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

DECISION OF THE BOARD; February 28, 1989

1. By letter dated February 3, 1989, counsel for the applicant and complainants asks that we reconsider and vary our decision of December 9, 1988 (hereafter referred to as "the decision"). For reasons set out in this decision, we deny that request.

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[Paragraphs 2 to 11 omitted: Editor]

12. Under the heading "Re Remedy", counsel submits that we erred in awarding damages only to the complainants. He asks that we vary our decision to award damages to all employees affected by the UFCW's breach of the Act. In support of that request, he makes the following submissions:

1. This complaint, although signed by 26 employees, was brought on behalf of all of the employees who had been affected. The employees in question held regular meetings

with the other employees in the bargaining unit to advise them of the outcome of the proceedings and were at all times acting as their agents.

2. It is inappropriate when considering a remedy of damages that a wrongdoer should profit from their own wrong. In this case, UFCW has been found to have breached Section 68 of the Act by not consulting all of the employees who were affected by the conclusion of the 10 Cuddy Boulevard collective agreement in the summer of 1987. It is submitted that it is inappropriate and contrary to the fundamental principles of remedy that UFCW should now only have to compensate certain named employees in this complaint. It is further submitted that the Board's jurisdiction under Section 89(4)(c) is specifically stated to be broad enough to include other employees affected by the breach of the Act. That section reads as follows: [quote omitted].
3. Although the Board's jurisdiction with respect to reinstatement is quite logically stated to related to rehiring the person or employee concerned, the section dealing with compensation has no similar restriction. In other words, nowhere in Section 89(4) does it state that the Board's jurisdiction is limited to granting a monetary remedy or compensation to those employees who are named in a particular complaint. It is submitted that the Board is bound and mandated under the Act to rectify the act or acts complained of. In particular where there has been a claim made against a trade union under Section 68 which represents all of the employees in the bargaining unit, then the Board is required to determine what would rectify the trade union's breach of the Act with respect to all of the employees in the bargaining unit. This may not be the case in every complaint under Section 68, but clearly in a complaint of this nature where the whole bargaining unit is affected by the breach, then the only way to grant a remedy to *rectify* the breach of the Act is to ensure that the remedy applies to all employees affected in the bargaining unit.

13. There appear to be two alternate submissions. One is that other similarly affected employees had authorized the complainants to act on their behalf in these proceedings and should now be treated as parties entitled to a remedy like that awarded to the complainants. The other is that, upon proof that they and others had been subjected to the same unfair treatment contrary to the *Labour Relations Act*, the complainants were entitled to have the Board determine and award a remedy for the unfair treatment of those others even if the others had neither complained to the Board nor authorized the complainants to do so on their behalf.

14. Form 58, the prescribed form by which complaints under section 89 are initiated, specifically contemplates a complaint's being filed on behalf of a person or persons other than the named complainant. Such persons are described in the form as "grievors". When a complaint is filed in that way, the complaint is the grievor's; he or she is considered to have control over it: *Norak Steel Construction Ltd.*, [1968] OLRB Rep. Sept. 638. The form requires that the names, addresses and telephone numbers of such grievors be listed in paragraph 2 of the complaint. The clear intent of the form is that complainants identify clearly the persons whose treatment is the subject of the complaint.

15. Where a complainant names another as grievor, the Board is concerned that the complainant has the grievor's authority to represent his or her interests. Except where the complainant is a trade union with bargaining rights for a unit which includes the grievor, the existence of that authority will not be assumed: *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197.

16. As filed October 13, 1987, the complaint in Board File 1928-87-U named 23 persons as complainants. It indicated in its paragraph 2 that the grievors were the 23 complainants. It said "the Complainants complain that *they* have been dealt with by the Respondent contrary to the provisions of section 68 ..." (emphasis added). The complainants later asked that 3 named persons be added as complainants. That would have been quite unnecessary if this were from the outset a proceeding concerned with vindicating the rights of all victims of the wrongdoing complained of by the

complainants. If the 26 complainants were authorized to make a complaint on behalf of any other employees, they did not do so and gave no notice that they intended to do so. Those other employees were not grievors in this proceeding. We would not add them as grievors at this stage of the proceedings except with the consent of the other parties. There is no suggestion that the other parties consent.

17. We do not accept the proposition that it is any part of the Board's function in dealing with a complaint under section 89 to award damages to persons on whose behalf no complaint has been made, anymore than it would be part of the Board's function to determine as against such persons that they are not entitled to damages. Their right to damages should not be adjudicated except in a proceeding to which they are parties. We do not propose to comment on the likely outcome if the other affected employees were now to file a complaint. We simply observe that their right to damages has not been determined in this proceeding. Except with their consent and the consent of the other parties, we would not now deal with it in these proceedings. A direction that a respondent pay money to persons whose potential claims against it would not thereby be settled would have the character (at least in all respects other than the identity of the payee) of an award of exemplary damages. If the Board has such a remedial jurisdiction, its exercise would be contrary to the remedial principles outlined in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraphs 90 and following, particularly paragraph 96.

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[Remainder of decision omitted: Editor]

0929-88-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Complainant v. Labourers International Union of North America, Local 1089 and **Foster Wheeler Limited**, Respondents

Adjournment - Evidence - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervenor status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Trim* and *N. A. Wilson*.

APPEARANCES: *Michael Church* and *J. Maloney* for the complainant; *Murray Gold* and *Robert Leone* for the respondent Labourers Local 1089; *Roy Fillion* and *Robin McDonald* for the respondent Foster Wheeler Limited; *Walter Thornton*, *S. Teperman* and *P. Greenspoon* on behalf of Metropolitan Toronto Demolition Contractors Association Inc.

DECISION OF THE BOARD; February 15, 1989

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour*

Relations Act ("the Act"). This matter came before this panel as a result of a unanimous direction by the panel of the Board which conducted the pre-hearing conference (Vice-Chair G. T. Surdykowski and Board members H. Kobryn and W. N. Fraser). That direction was rendered orally on February 1, 1989 and directed that a hearing be convened before a panel of the Board on February 2, 1989 (a day already scheduled for the continuation for the pre-hearing conference in this matter) for the purpose of determining the evidence of Area and Employer Practice which the Board will admit in respect of this complaint.

2. At the commencement of the hearing, Mr. Gold on behalf of the respondent Labourers International Union of North America, Local 1089 ("Labourers") strenuously objected to the hearing having been convened in this manner. He wished the Board to note that the hearing had not been convened on consent and argued that it had not been convened with sufficient notice to all the parties.

3. In addition to the parties to this complaint, at the commencement of the hearing Mr. Paul Greenspoon and Mr. Steven Teperman both appearing on behalf of the Metropolitan Toronto Demolition Contractors Association Inc. ("the Association") sought status to intervene and requested an adjournment. To date, the Association has not filed an intervention or any other documentation in this matter. At present it is not strictly speaking a "party" to these proceedings. It was however, named as an entity which may be affected by the complaint in the reply to the complaint filed by the Labourers. The Association had therefore received Notice of the Complaint on August 12, 1988. Thereafter, the Association received Notice of the pre-hearing conference scheduled on August 16, 1988, the report of that pre-hearing conference, and by letter from the Board dated October 19, 1988, the Association was notified that the pre-hearing conference would continue on February 1 and 2, 1989.

4. The Association sought status to intervene on the basis that in the past, members of the Association had performed work similar to the work in dispute. Certain members of the Association had in fact tendered in respect of this very project but were unsuccessful in their bid. The Association and the Labourers are bound to a collective agreement which has an "all employee" recognition clause. The Association does not have a collective agreement with the applicant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 ("Boilermakers"). The argument advanced on behalf of the Association, and supported by counsel for the Labourers appeared to be that any determination of the Board which found that the demolition of the No. 1 Boiler at the Dow Chemical Plant in Sarnia, Ontario (which the parties were in substantial agreement constitutes the work in dispute) would adversely impact upon the Association and its members as a result of the Association's collective agreement obligations with the Labourers.

5. The Association further requested an adjournment of the hearing and submitted that it had insufficient notice that issues such as the matter of the parameters of the evidence would be dealt with by the Board during or as a result of the pre-hearing conference. Mr. Teperman stated that the Association had intended to appear when the matter was heard on the merits, but had chosen not to attend the pre-hearing conference on February 1, 1989 because it was expected that this matter would be settled by reason of the discussions normally held during the pre-hearing conference. Mr. Teperman sought an adjournment so that members of the Association could discuss the matter and thereafter retain and instruct counsel to make representations to the Board.

6. Counsel on behalf of the Labourers supported the Association's request. Counsel on behalf of the Boilermakers and the respondent Foster Wheeler Limited ("Foster Wheeler") opposed the Association's request. Counsel on behalf of Foster Wheeler did not dispute the fact

that the Association did potentially have an interest in this matter, but argued that the Association ought not to be granted an adjournment in the circumstances of this case. Counsel on behalf of Boilermakers disputed the status of the Association to intervene. It was submitted by both counsel for the Boilermakers and Foster Wheeler that the Association had received Notice of all proceedings, had not sought counsel to represent it in the matter, and had not filed an intervention or any other document required pursuant to the Board's Practice Note 15. Both counsel characterised the appearance of the Association at this stage of the matter as a stalling tactic to delay the ultimate adjudication of this matter. It was submitted that, having not participated in the process to date, it was now too late in the day for the Association to appear. Both counsel also pointed to the prejudice that would occur to their respective clients if an adjournment was granted.

7. At the conclusion of these submissions we rendered the following oral ruling:

In consequence of a direction by the pre-hearing panel we convened the hearing this day for the purpose of determining the scope of evidence of Area and Employer Practice which the Board will admit with respect to this complaint. At the commencement of the hearing Mr. S. Teperman and Mr. Paul Greenspoon appeared and purported to represent the Metropolitan Toronto Demolition Contractors Association Inc. On behalf of that association Mr. Teperman requested permission of this Board to intervene in this hearing and thereafter requested an adjournment. Mr. Gold, on behalf of the Labourers Local 1089 supported Mr. Teperman's submissions to the Board. Mr. Filion on behalf of Foster Wheeler, and Mr. Church on behalf of the Boilermakers Local 128 objected to any adjournment being granted. Each also addressed the issue of the Association's status to intervene. After having heard the submissions of the parties, and without at this point determining the status of the Association to intervene in this matter, we deny the request by the Association to adjourn this matter today.

Assuming, and without deciding the issue, that the Association has status, we are not prepared to adjourn this matter in the circumstances of this case.

The Association first received notice of this jurisdictional dispute from the Board on August 12, 1988. At that time the Association was also notified of the time and place of the pre-hearing conference. We were advised by Mr. Leone, a representative of the Labourers union, that on August 16, 1988 representatives from the Association did in fact attend the pre-hearing conference. By letter dated August 31, 1988, the Association received a copy of the memorandum dated August 17, 1988 prepared by Vice-Chair G. T. Surdykowski in respect of the pre-hearing conference which took place on August 16, 1988.

Subsequent correspondence to the Association from the Board (respectively dated September 14, 1988 and October 19, 1988) provided to the Association further materials which had been filed in this matter, and notice of the continuation of the pre-hearing conference of this matter on February 1 and February 2, 1989. For its own reasons the Association chose not to file an intervention or any other documentation in this matter, chose not to attend the pre-hearing conference which continued on February 1, 1989 and chose not to retain counsel in this matter.

The Association now comes before us requesting an adjournment to retain

counsel in order to make submissions to this panel on this matter. Given the history of these proceedings and the Association's participation, or lack thereof to date, and in keeping with the purposes of the pre-hearing conference, the direction which the pre-hearing panel made on February 1, 1989, and most importantly in keeping with the purpose of jurisdictional disputes and the reasons for expedition of jurisdictional disputes, and the reasons and purpose of pre-hearing conferences (as these have already been articulated by the pre-hearing panel in yesterday's oral direction) we are not prepared to adjourn this hearing today.

9. After we rendered our oral ruling, we advised Mr. Teperman and Mr. Greenspoon that as the issue of the status of the Association to intervene had not been decided, they were welcome and invited to stay and participate in this hearing which would deal with the scope of the evidence of Area and Employer Practice which the Board will admit when this complaint is heard on its merits. We then adjourned the hearing over the course of the lunch hour. Upon our return after the lunch hour recess, the Association was represented by counsel, Mr. Walter Thornton. The Board reiterated its oral ruling made that morning for the benefit of Mr. Thornton and thereafter entertained the submissions of the parties in respect of the scope of the evidence.

10. We will not attempt to provide an exhaustive recitation of the full and comprehensive submissions of counsel for the applicant and the respondents. We intend merely to summarize and highlight their submissions. Before doing so however, we specifically note that Mr. Thornton chose not to make any submissions to the Board in respect of the scope of evidence. His failure to make submissions on this point however, was without prejudice to the position of the Association that it had status to intervene. He specifically reserved the right of the Association to make submissions to the panel of the Board which will ultimately adjudicate upon the merits of this complaint. In response to an inquiry from the Vice-Chair, Mr Thornton indicated that the Association did not thereby reserve its right to make submissions to that panel of the Board in respect of the procedural or evidentiary ruling which might be rendered by this panel as a result of the hearing which we had commenced that morning. Mr. Thornton specifically agreed that he would abide by any ruling which this panel makes in respect of the scope of the evidence which the Board will admit with respect to this complaint. For their part counsel on behalf of the Boilermakers, Foster Wheeler, and the Labourers each agreed that the failure of the Association to make submissions at this stage was without prejudice to the Association's submissions in respect of its status to intervene, and would not be raised by them when the matter of the Association's status is addressed by the panel of the Board which will ultimately adjudicate upon the merits of this complaint.

11. Counsel for the Boilermakers and Foster Wheeler urged the Board to limit the amount of evidence to be admitted by the Board to evidence of projects which were substantially similar in nature to the dismantling or demolishing of the No. 1 Boiler at the Dow Chemical Plant in Sarnia, Ontario. Both counsel made specific reference to

- (a) the type of structure which is to be dismantled or demolished, (an 80-foot high boiler with dimensions of approximately 30 feet long and 30 feet wide)
- (b) the environment in which the boiler is to be dismantled or demolished (an operating environment with the No. 1 Boiler situated approximately twenty-three feet away from another operating boiler)

- (c) the method in which the demolition or dismantling of the boiler is to be performed.

Both counsel submitted that as the dismantling or demolition of this type of structure in an operating environment was relatively rare or unique, the evidence of "Area" Practice ought not to be restrictive and should include all of North America. It was argued that the probative value of the demolition or dismantling of other types of structures in other types of environments was minimal. Moreover, such evidence would substantially lengthen the hearing in this matter, and thereby add to the cost of these proceedings to the parties, (to say nothing of the resources of the Board) and would unduly delay the final determination and adjudication of the matter to the prejudice of the parties. In addition counsel for the Boilermakers submitted that it was the Boilermakers who had filed the complaint and were claiming the work in dispute. It was therefore argued that only evidence of work which was within the jurisdiction of the Boilermakers, or work which fell within their "craft" was relevant.

12. Counsel for the Labourers submitted that the evidence which ought to be admitted by the Board was the evidence of the dismantling and demolition of structures in the Board area. Counsel argued that the substance of the Labourers' case was that the "Area Practice" was that if a structure was demolished and used for scrap it was Labourers' work. Counsel argued that in order to make their case, and to refute, dispute or otherwise meet the case of the Boilermakers, it will be necessary for the Labourers to lead evidence of demolition in the area without distinction as to the type of structure involved. Counsel also submitted that Foster Wheeler was bound to the "Demolition Agreement" between the Labourers and the Association by operation of law, namely by force of the Minister's designation order dated April 18, 1986 and by reason of the "cross-over" clause found in the Labourers Province wide ICI Agreement. (Foster Wheeler disputes that it is bound in any way to the Demolition agreement). Counsel argued that if the Labourers were successful in their assertion that Foster Wheeler was bound to perform the demolition work pursuant to the provisions of the Demolition Agreement, the Board would require evidence of, and be prepared to adjudicate upon, the issue of what constitutes "demolition". Counsel submitted that the Labourers intended to call evidence to prove what type of work constitutes "demolition", and argued that such evidence ought not to be limited to demolition of substantially similar structures in substantially similar environments because "demolition" encompasses a host of other structures in varying environments. Counsel also submitted that the "Area" Practice ought to be limited to Board area 2 as this would result in a more expeditious hearing and have a more useful precedential value. Finally, counsel also argued that to accede to the submissions of Foster Wheeler and the Boilermakers to limit the evidence would be a denial of natural justice as it would result in this panel of the Board "pre-determining" the case, without having heard any evidence as to what the case is about. In addition, a restrictive ruling in respect of the relevance of certain evidence at this stage of the proceeding would unduly fetter the discretion of the panel of the Board which will hear the merits of this complaint if that panel is a panel different than this one.

13. At the conclusion of the hearing of the submissions of the parties in respect of this matter the Board rendered the following oral ruling:

Section 91 of the *Labour Relations Act* authorizes this Board to inquire into a jurisdictional dispute involving "*particular work*". After having considered the submissions of the parties and in view of the language used in section 91 we make the following ruling in respect of the parameters of the evidence which the Board deems relevant in respect of this complaint.

The evidence to be adduced will be limited to the evidence within the following parameters:

Only evidence relating to field erected, steam generating boilers, for industrial application, originally erected using Boilermakers, which were or are being dismantled or disassembled in an operating environment in the province of Ontario.

In our view, the reference to "particular work" in section 91 compels the Board when examining "employer" and "area" Practice to inquire into work involving the same or similar type of structure, in the same or similar type of environment.

14. In addition, counsel were provided with the following dates for the hearing of this complaint. There was agreement amongst counsel that after consultation with each other, the Registrar's office would be notified which dates were required for the hearing. We note that a failure by counsel to agree on dates may result in the Registrar scheduling this matter without any further consultation with the parties. The dates provided to counsel were May 8th, 9th, 10th or 11th, 15th, 16th, 17th or 18th, 23rd, 24th, 25th, 29th, 30th, 31st, June 5th, 6th, 7th or 8th, 12th, 13th, 14th or 15th, 19th, 20th, 21st or 22nd, 26th, 27th, 28th or 29th.

2937-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Fram Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Evidence - Petition - Board discussing the effect of an earlier petition on the voluntariness of a later petition -Circumstances surrounding the prior circulation of a petition are relevant to the voluntariness of a subsequent document but the voluntariness of the signatures on the earlier document is not a relevant question - Petition found voluntary - Vote ordered

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. A. Correll* and *D. A. Patterson*.

APPEARANCES: *L. A. MacLean*, *John Moszynski*, *Wayne McKay* and *Glen Myers* for the applicant; *Joseph Carrier*, *Elizabeth Keenan*, *Thomas Patterson* and *Edward Bocik* for the respondent; *M. Mitchell* for the objectors.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER W. A. CORRELL:
February 7, 1989

1. This is an application for certification. The applicant (hereafter referred to as "CAW") is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"). Our many days of hearing this application ended in early October 1988. They would have ended earlier, in late July 1988, but for the CAW's desire to have its counsel appear for it in another matter on dates for which this application had long been scheduled, and the other participants' willingness to accommodate the CAW.

2. When this matter first came on for hearing before a differently constituted panel of the

Board, there was a disagreement about whether the persons employed in the “mixing room” should be included in or excluded from the bargaining unit which the applicant, respondent and objectors (collectively referred to here as “the participants”) otherwise agreed was the appropriate bargaining unit for the purpose of this application. The applicant and respondent took the position that such employees should be included in the bargaining unit. The objectors took the position that they should be excluded. The participants were directed to exchange and file statements of the material facts on which they relied in support of their respective positions on this issue. When the application came back on for hearing before this panel, all of the participants were content that we resolve this issue with reference to the material filed, without hearing any further evidence. None of the participants addressed any argument to this issue at the conclusion of our hearings. Having regard to the respondent’s essentially uncontested description of their terms and conditions of employment, we are satisfied that persons employed in the positions in dispute share a sufficient community of interest with other employees in the proposed bargaining unit as to warrant our acting on the agreement of the applicant and respondent that such persons should be included in that unit. Accordingly, we find that

all employees of the respondent in the City of Stratford save and except supervisors, persons above the rank of supervisor, office and sales staff, laboratory and technical staff and students employed during the school vacation period(s)

constitute a unit of employees of the respondent appropriate for collective bargaining in this application. The phrase “laboratory and technical staff” does not encompass persons working in the mixing room, who are included in this unit. We note the participants’ agreement that the phrase “laboratory and technical staff” does comprise staff involved in manufacturing engineering, process engineering, industrial engineering, product engineering (including the model shop), the laboratory (apart from the mixing room) and the Industrial Products Department.

3. Lists filed by the respondent indicate that (applying the Board’s “30-30” test to those not at work on the application date) 433 persons were employed in the bargaining unit on the application date. The applicant says that five of those persons were not so employed on that date. It is unnecessary to determine whether that is so, because no outcome of that dispute could affect the disposition of this application. The applicant filed 273 documents, each consisting of an application for membership and acknowledgement of the payment of \$1.00 on account of dues. 254 were signed by persons who, according to the employer’s lists, were employed in the bargaining unit on the application date. The objectors filed 226 cards (“petition cards”) each bearing a signature, a witness’ signature and date below a hand-printed heading in one of two forms, each of which clearly expresses opposition to certification of the applicant. 42 of these petition cards bear signatures of persons in the unit on the application date (according to the employer’s lists) who, prior to the date on the petition card, had signed one of the applications for membership filed by the applicant. The applicant filed 61 typewritten statements reaffirming support for the applicant. Of the 213 persons who signed such reaffirmations, 11 are persons employed in the bargaining unit on the application date (according to the employer’s lists) who had signed both an application for membership in the applicant and a petition card expressing opposition to certification of the applicant. The effect given to these various sorts of documentation has been reviewed extensively elsewhere: see *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15-17; *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and *Baltimore Aircoil Interamerican Corp.*, [1982] OLRB Rep. Oct. 1387, particularly at paragraph 49. We will not duplicate that review here. Having regard to the principles reviewed in those decisions, the critical question here is whether the 31 petition cards signed by persons who had earlier applied for membership in the applicant but did not later sign reaffirmations represent voluntary expressions of the wishes of

those persons. If they do, the Board would direct that the outcome of this application be determined by the result of a representation vote, even though more than fifty-five per cent of the employees in the bargaining unit on the application date were “members” of the applicant at the relevant time within the extended meaning given to that term by clause 1(1)() of the Act, for reasons elaborated in *Unlimited Textures Company Limited*, *supra*, at paragraphs 15-17.

4. The respondent is a manufacturer and distributor of automotive filters, spark plugs and related products. The plant with which we are concerned in this application was the subject of an unsuccessful organizing campaign 10 years or so ago. The campaign which led to this application began in about August 1987. The application itself was not filed until January 28, 1988. As the campaign progressed, employees who supported the union openly demonstrated their support in the workplace by wearing hats, T-shirts and other paraphernalia bearing CAW markings. On one occasion, indeed, one of the union’s supporters went so far as to catch the attention of the company president, Ted Martin, as he was walking through the plant and, when the president came over to his work station, point to his CAW hat and say “how do you like my hat?”, or words to that effect. While the worker in question has a different version of this incident, we do not accept it. It was one of a number of allegations of management misconduct and interference which proved to be exaggerations, distortions or misrepresentations of actual events of a much more neutral character.

5. We do not propose to review the union’s allegations of management misconduct in detail. We are satisfied that the respondent’s communications with its employees during the applicant’s organizing campaign remained within the bounds of the free speech in which employers are entitled to engage under section 64 of the Act, and that no member of management instigated or participated in the origination or circulation of the petition cards on which the objectors rely or of the earlier petition documents on which considerable attention was focused during the course of our hearings. Those conclusions are by no means the end of an inquiry of this sort, however. Even if there is no actual management involvement in the origination or circulation of documents expressing opposition to certification of a union, such documents will be given no weight as evidence of the wishes of the employees who signed them if they were signed in circumstances which would have created in the minds of those employees an objectively reasonable belief that their employer would learn whether or not they signed.

6. Section 73 of the Board’s Rules of Procedure requires that evidence of objection by employees to certification of a trade union be filed by the terminal date for the application in writing. It provides that no oral evidence of such objection shall be accepted by the Board except to identify and substantiate written evidence filed in a timely manner. Documents expressing opposition to representation by or certification of a trade union are generally referred to as “petitions”. Those who would have the Board treat petitions as reliable evidence of the employee wishes have the onus of establishing that the documents represent “voluntary” expressions of the wishes of the employees who signed them. This onus has two components: a burden of adducing certain evidence and a general burden of persuasion. The burden of adducing evidence is defined in a negative way in subsection (5) of section 73 of the Board’s Rules of Procedure, which provides:

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

Thus, those persons (usually referred to as the “petitioners” or “objectors”) who would have the Board treat petition signatures as voluntary must produce witnesses whose collective personal knowledge extends to at least the matters identified in paragraphs (a) and (b) of subsection 73(5). This ensures that the question of “voluntariness” is not dealt with in a vacuum. The matters about which those witnesses must be capable of testifying may not be the only matters relevant to the question of voluntariness. Any party to the application may call other witnesses to deal with any such other matters or to amplify or contradict the testimony of the witnesses whom the objectors have produced in discharge of the burden to adduce evidence imposed by section 73(5) of the Rules. All of the parties’ evidence is weighed by the Board to determine, on a balance of probabilities, whether the petition filed represents a voluntary expression of the wishes of those who signed it. The objectors bear the overall burden of persuasion on that issue: if the Board finds the probabilities evenly balanced, it will not treat the petition as voluntary.

7. The petition cards with which we are concerned were not the first written expressions of opposition to the applicant to be circulated among the employees during the applicant’s organizing campaign. On November 20, 1987, during a period when the line they were working on was out of operation, Marilyn Wheal and a fellow employee wrote out several sheets with a heading which said “We the undersigned are against the union.” They began getting signatures on these sheets during working hours. No application for certification had been filed at that point, so there was no Notice to Employees in Form 6 posted alerting employees to, among other things, the requirements of subsection 73(5) of the Board’s Rules of Practice and consequent need for a witness or witnesses to keep track of the circumstances in which signatures are obtained. These first “petition” documents came to be passed from one person to another without regard to the need to later account for custody and identify and produce the witnesses to each of the signatures. Other employees generated additional sheets during this process.

8. Over the course of several days, 9 sheets found their way to Linda Barclay and Marilyn Wheal with approximately 170 signatures on them. They did not know what to do with them. Karen Mitchell, who then worked in Quality Control along with Marilyn’s husband Jim, expressed a willingness to deal with the matter. The sheets were given to her, and she kept them safe in her home while she found out what she should do. For a brief period, Ms. Mitchell circulated another document expressing opposition to the applicant. Once she had met with counsel, however, she concluded that it would be best to start over with a fresh set of documents over which she could exercise sufficient control that the Board’s requirements with respect to evidence in support of “petitions” could later be met. There is no evidence and there was no serious suggestion that she did this because she or any of the other objectors thought there had been any actual or perceived management involvement in these first petitions.

9. Having learned from counsel about the Board’s requirements with respect to petitions, Karen Mitchell came up with the idea of obtaining evidence of opposition in the form of cards designed to be signed by just one employee, for filing with the Board if and when the CAW filed a certification application. These were prepared on index cards, each with a handprinted preamble expressing opposition to certification of the CAW. Karen Mitchell, Jim and Marilyn Wheal and Linda Barclay were involved in obtaining signatures on these petition cards, each of which came to bear an employee’s signature, the witness’ signature and a date, in December 1987, and January and early February 1988. Each of them testified and was cross-examined extensively about the immediate circumstances in which each of the petition cards was signed. We do not propose to review that evidence in detail. There is nothing in it or in the applicant’s evidence of events contemporaneous with the signing of petition cards which would lead us to conclude otherwise than that those cards represent voluntary expressions of the wishes of those who signed them. There is,

however, the matter of the earlier petitions and the circumstances of their origination and circulation.

10. A good deal of the applicant's attack on the voluntariness of the petition cards focused on the petition documents circulated in late November 1987. Ms. Mitchell still had those documents in her possession. They were produced to the Board. Having regard to subsection 111(1) of the Act, they were not produced to the other participants, but they were described to the participants in as much detail as possible short of revealing the names of those who had signed them. After obtaining from the parties an agreed list of members of management, the Board was able to verify that none of those persons appeared to have signed any of these earlier petition documents. Ms. Mitchell, Ms. Barclay and the Wheals were all questioned at length on their knowledge of the circumstances surrounding the origination and circulation of those documents. Other employees who had been involved were also called by the objectors as witnesses to give evidence about what they knew of the circumstances of origination and circulation of those documents. It is apparent from all of the evidence that these documents circulated in the work place during working hours. It was not the experience of the objectors' witnesses that any of the documents were signed in the presence of any member of management or came into the possession of any member of management at any time. Indeed, Marilyn Wheal testified that they were careful not to deal with these documents in the presence of any foremen because they knew they were "not supposed to stand around" and because there were rumours that some of the foremen "were behind the union." (Interestingly, there was no suggestion by the union's counsel, either by way of cross-examination or other evidence, that a belief in these rumours about the foremen was without any reasonable foundation.) The witnesses called by the objectors did not together have personal knowledge of the circumstances in which every signature on the earlier petition documents was obtained, however, nor could they together personally account for the whereabouts of every document at every point in time from its creation to its delivery to Ms. Mitchell.

11. Dale Walters, one of the union's witnesses, claimed that one of these earlier petition documents had been circulated by Shirley Court during working hours in the presence of supervisors. One day during the time frame in which the first petitions were circulated, Mr. Walters saw Ms. Court, whom he understood to be a relief operator for Line 75, moving along Line 71 with a clipboard speaking to workers on the line. She did so within sight of two supervisors, who ignored her activities. Mr. Walters did not say that he had seen anyone sign anything on Ms. Court's clipboard. He acknowledged that he had not seen what was on that clipboard. His belief that the clipboard had a petition document on it was based, he said, on the fact that Ms. Court was in a place where he believed she had no business being and, also, on conversations Mr. Walters said he had had afterwards with persons whom Ms. Court had approached. When it was suggested to him in cross-examination that Ms. Court might have been in the area either in her capacity as a member of the health and safety committee or because she was involved in arranging a Christmas function, Mr. Walters could not deny that these might have been reasons for her being in the area, but repeated that his belief that she was there to circulate the petition was based on conversations he had had with others. It was clear to counsel for the union that the Board would not accept Mr. Walters' recital of what others had told him as evidence of the truth of what he claimed to have been told. None of Mr. Walters' alleged sources was called to testify, nor was the failure to call them explained. In the circumstances, Mr. Walters' testimony is an inadequate basis for any conclusion that the first petition was circulated overtly in the presence of management.

12. Another union witness, Margaret Paulus, testified that she heard the signing of the petition discussed in the presence of a supervisor, Aleida McGregor. Ms. Paulus was standing on one side of a conveyor belt. Noreen Bickle and Brenda Moore were standing on the other side. Ms. McGregor came up, stood between Ms. Bickle and Ms. Moore and entered into a conversation

with Ms. Moore. While that conversation was going on, Linda Leeming came up and spoke to Noreen Bickle. Ms. Paulus could not hear what Ms. Leeming said, but heard Ms. Bickle reply "he wants to sign it - go to Steve and get it from him" or words to that effect. As Ms. Paulus stood watching the individuals mentioned, Ms. McGregor looked up at her then said to Ms. Moore "I better leave, I'm being watched", or words to that effect. Ms. Paulus believed that the conversation between Leeming and Bickle was about the petition, because she believed that an employee named Steve was involved in the circulation of the first petition. Ms. Paulus was not able to say with any confidence that Ms. McGregor must have heard the exchange between Ms. Leeming and Ms. Bickle while she was carrying on her conversation with Ms. Moore. We note that when Ms. Bickle was later called by the objectors as a reply witness to deal with another issue, she was not cross-examined with respect to the incident about which Ms. Paulus testified.

13. Because those involved in the circulation of the petition cards had in varying degrees been involved in the creation and circulation of some of the earlier petition documents, and because those petition documents were then available to Ms. Mitchell and the others to assist them in identifying employees who might be willing to sign their petition cards, counsel for the union argued that first petition documents and the petition cards were so connected that the circumstances of circulation of the earlier documents and the gaps in the evidence with respect to their circulation should lead us to reject the later petition cards as evidence of the true wishes of the persons who signed them. There were two prongs to this argument. One was that the manner of circulation of the first petition documents created a perception of management influence or involvement which "tainted" the subsequent petition cards because of the connection between the two. The other argument was that the failure of the objectors to call witnesses who could account for the whereabouts of the first petition documents at all times during their existence was itself a sufficient basis, because of the connection, to reject the petition cards.

14. With respect to the latter argument, counsel for the union quoted the following passage from paragraph 11 of the Board's decision in *Consumers Distributing Company Limited*, [1982] OLRB Rep. Jan. 26:

11. ... Where a second petition has its genesis in an earlier petition, the Board has in a number of previous cases commented on the need for probative evidence with respect to the circumstances surrounding *both* petitions, even though only the later one is filed with the Board and relied upon by the petitioners. While the first document was not what is normally referred to as a "petition" (a document directed to the Board in response to notice of an application for certification), the substance and intent of the letter to the Union is so close to that of the subsequent petition to the Board, that the Board would be remiss not to consider carefully the weight to be attached to the absence of evidence from the employee directly responsible for the preparation and circulation of the first document.

In order to put this passage in perspective, we should quote the balance of that paragraph as well as the four paragraphs which follow it:

11. ... On the other hand, the fact remains that this was not a document filed with or even directed to the Board, and that it was nor prepared pursuant to the explanation and requirements set out in the Board's Notice to Employees. Bearing that in mind, the failure of the objecting employees to have attended the hearing with the person primarily responsible for that document is wholly understandable.

12. The Board has reviewed the cases relied upon by the applicant, and finds that they are roughly divisible into two groups. the first group of cases does not turn upon gaps in the evidence at all. Rather, they are cases where the evidence establishes that the first petition would have been clearly associated with management in the minds of the employee, and that the second petition was directly related to and "tainted" by the first. See *Fisher Governor Co. of Canada Ltd.*, [1968] OLRB rep. Dec. 905; *Reel-Pack Ltd.*, [1965] OLRB Rep. Dec. 629; *Argo*

Cleaners, [1965] OLRB Rep. Dec. 586; *Merchants Paper Co. (Windsor) Ltd.*, [1965] OLRB Rep. Apr. 12; *Rainbow Ready-Mix Ltd.*, 63 CLLC ¶16,259; *Lakehead Newsprint Ltd.*, [1961] OLRB Rep. Feb. 397; *Levi Strauss of Canada, Inc.*, [1972] OLRB Rep. Dec. 1041 and *General Crane Industries Ltd.*, [1974] OLRB Rep. Oct. 662.

13. The second group of cases does in fact deal with an absence of evidence with respect to a predecessor petition. In *Weyerhaeuser Canada Ltd.*, [1964] OLRB Rep. Feb. 599, the petitioner conceded that her own petition had been preceded by a series of petitions which had been circulated and subsequently delivered to the office of a lawyer. The petitioner also conceded that she knew absolutely nothing concerning the history of those previous petitions, and as a result, the Board as well was left with no knowledge in respect to those previous petitions. Similarly, in *Sentry Department Stores Ltd.*, [1968] OLRB Rep. Oct. 677 and [1968] OLRB Rep. Nov. 851, the document filed by the petitioner was identical to one which had been previously circulated and then filed with the petitioner's lawyer. The petitioner's only evidence as to the origination of her petition was that she had obtained from her lawyer a copy of the same document as was previously circulated. She had no idea who had instructed the lawyer with respect to the original document. Once again the Board found that it had to reject the petition before it, because, as it stated, it had no evidence as to the origination of the first document. Finally, the case of *Tri-Sure Products Ltd.*, [1970] OLRB Rep. June 324 involved a combination of the absence of evidence with respect to a prior petition, plus sufficient circumstances before the Board to cause it to view with concern and suspicion the origination of that earlier petition.

14. In the present case, the Board has before it considerable (but by no means complete) evidence with respect to the circumstances surrounding the origination and circulation of the first document. Mrs. Hood was in fact one of the first employees to engage in discussions about changing their minds, and wrote to the union a letter which, from her evidence, was similar to the one circulated. In this case, the existence of these earlier letters (including the one circulated) to some extent corroborates, rather than undermines, Mrs. Hood's own explanation of the genesis of the petition which she subsequently filed with the Board. While the absence of testimony from the employee most directly involved with the origination and circulation of the letter to the union leaves open the possibility of improper management involvement of which Mrs. Hood herself was unaware, Mrs. Hood's own knowledge of and association with the circumstances giving rise to these letters makes this possibility more remote than would otherwise be the case. In the absence of any evidence of generally improper interference or lack of restraint on the part of the respondent's management personnel in this case, the Board is not prepared to speculate to that degree.

15. In *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289, the Board was faced with a gap in the evidence with respect to delivery of the subject petition to the Board, and had this to say about the potential effect of gaps in the evidence generally, at paragraph 18:

... Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from reparation to delivery to the Board may prove fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement. The Board, however, has never rejected a petition simply for the reason that it lacked first-hand evidence of the delivery of the document. The issue is one of voluntary expression and if the Board is satisfied that the origination and preparation of the statement is free of employer interference and is further satisfied that each of the signatures has been obtained in circumstances which would not thwart free expression and where, as in this case, a legitimate reason exists for the absence of the person who mailed the petition, the Board would be hard pressed to find that it had not been satisfied as to the voluntariness of the statement.

As noted, the first document was not even a "petition" to the Board, and the Board draws no inference of a deliberate intent to avoid scrutiny from the failure of the circulator of that docu-

ment to attend the hearing. Perhaps more important is the lack of overt interference by the respondent in general. The meetings with employees had by November become a well-established practice, and there is no evidence that the respondent took undue advantage of these meetings to overstep the bounds of permissible employer comment. While the manner chosen by the respondent to distribute the applicant's propaganda was a good deal less than perfect, it must be recalled that it was the applicant itself that initially involved store management in the distribution of its propaganda to unnamed employees through the unusual and presumably economical method of campaigning adopted in this case. The Board does not find that this factor alone creates the kind of background which would cast the present petition in doubt. For another recent case in which the restrained response of the employer became critical to the Board's ultimate conclusion that a petition was voluntary, see, *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551.

15. We have no difficulty at all with the abstract proposition that the circumstances surrounding the prior circulation of a document opposing trade union representation are relevant to the Board's assessment of the "voluntariness" of a different and subsequent document filed with the Board in connection with a certification or termination proceeding. That is not to say that the "voluntariness" of signatures on the earlier document becomes a relevant question. The voluntariness of the document filed with the Board and relied upon by the objectors is still the issue. The circumstances surrounding the earlier document are relevant only to the extent they bear on the question whether the *subsequent* document is reliable evidence of the true wishes of those who signed it. It is unnecessary to elaborate all the sorts of situations in which that relevance might arise. To take but one generic example, the circumstances surrounding the circulation of the earlier document might have been such as to raise in the minds of employees a reasonable perception (whether true or not) that management was somehow involved in the exercise and would learn from those circulating it the identities of those who did or did not sign it. A similar perception might then arise with respect to a subsequent document filed with the Board if those who had circulated the earlier document were responsible for circulating the document put before the Board.

16. It is not enough, however, to shift the focus of attention to an earlier document, find that it would not have been treated as reliable evidence of the wishes of those who signed it and then, by reason of some connection between the two documents, pronounce the one before the Board to be "tainted" or "infected" with the infirmities of the earlier one. The use of these words, with their connotations of disease and decay, carries with it the danger that they will become substitutes for thought. The question is not simply whether there is a connection to an earlier document with an infirmity but, rather, whether the nature of the infirmity and the nature of the connection support a conclusion that the document filed and relied upon by the objectors is not itself reliable evidence of the wishes of those who signed it.

17. Even the most cursory study of the Board's jurisprudence would reveal that there are a wide variety of circumstances which may engender in employees an objectively reasonable (even if false) perception of management involvement in the origination and circulation of a statement in opposition to trade union representation, with the result that that statement is not given weight by the Board in assessing employee wishes. This can result even from behaviour of persons other than the employees who brought the document into existence and solicited the signatures on it, behaviour over which those employees had no control at all. Even so, evidence with respect to such behaviour weighs in the balance in determining whether, on a balance of probabilities, a petition represents a voluntary expression of the wishes of those who signed it. It could not seriously be suggested, however, that the burden imposed on those who rely on the petition by section 73(5) of the Rules requires that they produce witnesses who, from personal knowledge, can together negate the existence of all the sorts of circumstances which might lead to a conclusion that the petition is not voluntary.

18. We were quoted all but the last, emphasized sentence of the following passage from the Board's decision in *Levi Strauss of Canada, Inc.*, [1972] OLRB Rep. Dec. 1041 at paragraph 12:

... there is no question in our minds that the evidence relating to the origination, preparation and circulation of petition #2, standing alone, would have satisfied us that the document represented a voluntary expression of the desires of the signatories thereto. However, the Board has on numerous occasions failed to recognize an otherwise valid petition and has treated the document as tainted or contaminated in circumstances where, to use the word suggested by the counsel for the applicant, the document in question has been "infected" by improper circumstances surrounding the taking of a previously existing petition. *There can be no question that the onus of proof in this regard, is upon the applicant.*

The applicant in that case was the trade union applicant for certification. Even with its use of the language of disease and decay, this passage recognizes that the assessment of the voluntariness of a petition may turn on matters in respect of which those who argue that the petition is not voluntary bear some initial obligation to present evidence.

19. Nothing in the testimony about the origination and circulation of the first petition document leads us to conclude that employees who were later asked to sign the petition cards would have had an objectively reasonable perception that management was likely to learn whether or not they signed a petition card. In other words, the objectors have satisfied the burden of persuasion on that issue. The only burden of adducing evidence which the objectors bore independent of the burden of persuasion was the obligation proposed by subsection 73(5) of the Board's Rules of Procedure and reflected in the Form 6 Notice to Employees of Application and Hearing posted in the workplace.

20. We do not think that obligation under subsection 73(5) is as broad as might appear from the decisions referred to in paragraph 13 of the Board's decision in *Consumers Distributing*, *supra*. The observations made by the Board in the passage which we have quoted from the *Consumers Distributing* decision are in many respects applicable to the circumstances of this case. Whether or not subsection 73(5) of the Rules of Procedure made it necessary for the objectors to call all the witnesses they did with respect to the origination and circulation of the first petition documents, the evidence they adduced through the witnesses they called was sufficient to comply with the basic burden of adducing evidence imposed by that subsection. The "gaps" in evidence about the origination and circulation of the first petition do not represent a failure to comply with the evidentiary burden imposed by subsection 73(5) of the Rules. Moreover, the "gaps" do not give us concern in the context of this case when weighing the probabilities on the issue of voluntariness. As in the *Consumers Distributing* case, the employer's behaviour in response to the union's organizing campaign was restrained. It gave no indication, by word or deed, that the exercise by its employees of their individual and collective rights under the *Labour Relations Act* would become the subject of punishment or reward. The fact that the union, with its many members, failed to adduce any direct evidence of the first petition's having been signed in the presence of members of management or of any other event which might have created a perception of management involvement in that petition reinforces the conclusion, in these circumstances at least, that no such event did occur.

21. We find that the petition cards filed represent a voluntary expression of the wishes of those who signed them.

22. The objectors devoted considerable evidence and argument to their allegations about the behaviour of Mr. Bill Flick, one of the union's most vocal supporters and employee organizers, toward those whom he perceived to be involved in the circulation of documents in opposition to the trade union. It is unnecessary for us to describe that behaviour in detail. Perhaps the most telling thing that might be said about it is that counsel for the union said that the union did not con-

done it and that he would expect us to disapprove of it. That behaviour, however condemnable, does not affect the result of any of the issues with which we are obliged to deal in this decision. It does not in any way affect our conclusion about the number of bargaining unit employees who were "members" of the applicant at the relevant time within the extended statutory definition. Nor does it affect our conclusion about whether a representation vote should be ordered. That is not to say it is irrelevant to the outcome of this application. It may have had an effect on the applicant's prospects for ultimate success. It is simply irrelevant, in the result, to those aspects of this application of which the Board is the judge.

23. We find that over fifty-five per cent of those employed in the bargaining unit on the application date were members of the applicant on February 17, 1988, the terminal date fixed for this application and the date which the Board determines, pursuant to clause 103(2)(j) of the Act, to be the time for ascertaining membership under subsection 7(1) of the Act. In the exercise of our discretion under subsection 7(2) of the Act, we direct that a representation vote be conducted among employees in the bargaining unit. All those employed in that unit on the date of this decision who are so employed on the date the vote is conducted will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment with the respondent.

24. The matter of arrangements for and conduct of the representation vote is referred to the Registrar under section 68 of the Board's Rules of Procedure.

DECISION OF BOARD MEMBER D. A. PATTERSON: February 7, 1989

1. I dissent from the decision of the majority. I do not believe the objecting employees discharged the burden of onus on them in proving to this member of the Board that the document filed with the Board, hereinafter referred to as the second petition, was flawed by the circulation of an initial document not filed with the Board, hereinafter referred to as the first petition.

2. The actions of Ms. Mitchell for the objecting employees demonstrate the first petition was less than a voluntary expression of the employees' wishes. After consultation with her counsel, Ms. Mitchell made the decision to disregard the first petition and to initiate a second statement of desire amongst employees. The evidence before the Board from the objecting employees was that the first petition commenced on November 20, 1987. It was circulated by a number of employees on approximately seven sheets of paper. Approximately 170 signatures were affixed to those sheets.

3. Signatures were secured by Karen Mitchell, Jim Wheal, Marilyn Wheal and Linda Barclay and others. It was the evidence of the objecting employees that the first petition was on sheets which were handed and passed around the plant. It is this lack of care and control over the circumstances surrounding the circulation of the first petition which causes the doubt this Board member has over its voluntariness.

4. There are two long-standing cases that have been relied on over the years by the Board when dealing with petitions. They are *Pigott Motors*, 63 CLLC ¶16,264 and *Morgan Adhesives of Canada Ltd. and C.P.U.*, [1975] OLRB Rep. Nov. 813. Both cases are cited and highlighted in the *Radio Shack*, decision [1978] OLRB Rep. Nov. 1043, at paragraph 24:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the

employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors case*, 63 CLLC ¶16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

5. Although no conclusive evidence was presented by the applicant as to the hand of management being involved, the applicant did challenge the voluntariness of the second petition. It was through the applicant's suspicion of the petition that the Board found out about the first petition and I believe that a reasonable employee would be suspicious of the second document and its voluntariness.

6. The Board's Rules of Procedure, in particular section 73, requires the objecting employees to bear the burden of onus establishing the petition represents a voluntary expression of the true wishes of the employees. If the objecting employees cannot attest to the care and control of such documents, there is no way of ensuring the employees that the employer was not aware of who signed the first petition. If different persons would have been responsible for the circulation of the first petition, I would have found the second petition to be voluntary. However, the same persons, or the movers of the second petition, were also involved in the origination and circulation of the first petition. Therefore, the flaws of the first petition must carry over to the second petition.

7. I would have dismissed the objecting employees' statement of desire and certified the union since they were in excess of 55% of the eligible employees signed.

1295-85-R Retail, Wholesale and Department Store Union AFL-CIO-CLC, Applicant v. **Hamilton Yellow Cab Company Limited**, Fleet Taxi, Yellow Taxi, Transportation Unlimited Inc., D. J. Van Boort, R. Cruden, R. Maurice, J. Lynch, B. Greenland, M. Ferguson, R. Geer, E. Grasley, V. Sudhir, A. Dicasa, P. Dicasa, R. Deacons, R. Botton, F. Mattioli, W. Bray, J. R. McNally, R. Kaur, G. Seliga, W. T. Vanderheyden and Peter Quesnelle, Respondents

Bargaining Unit - Certification - Dependent Contractor -Reconsideration - Board certifying union for two units, one of owner operators/dependent contractors and the other of drivers - Board declining to reconsider its decision

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

DECISION OF THE BOARD; February 22, 1989

I

1. This is an application for reconsideration of two decisions of the Board dated November 18, 1987 [reported at [1987] OLRB Rep. Nov. 1373] and October 14, 1988. In those decisions, the Board certified the applicant union as the bargaining agent for bargaining units of "owner operators" and "drivers" working "under the banner" of Hamilton Yellow Cab Company Limited ("Yellow"). The Board made that determination after finding that more than fifty-five per cent of the employees in each of these groups had signified their desire for trade union representation in the manner prescribed by the Act.

2. The respondent contends that the Board was without jurisdiction to create two separate bargaining units (i.e. one comprising "owner operators"/dependent contractors, and a second comprising "pure drivers"), and that, in any event, the Board should not have done so without formally canvassing the wishes of all of the employees by means of a vote. The respondent further contends that the bargaining structure established by the Board's decision creates an "anomaly" because, it is said, there is a relationship of dependence between the owner operators/dependent contractors in one bargaining unit, and the "pure drivers" in the other. The legal result flowing from this second submission is not spelled out in the request for reconsideration, but, presumably, the respondent is asserting that the union should not be entitled to represent one or other of the two units even though it enjoys majority support in both of them.

3. We should also note that no employee or owner operator appeared before the Board in the extensive hearings in this matter to express any concern about the structure of the bargaining units or the alleged "conflict of interest" here mentioned by the respondent, even though it was the union's initial application, (of which the drivers had notice) that all of the "working drivers" operating "under the banner" of Yellow Cab should be encompassed in one bargaining unit. No driver suggested otherwise. In this respect, then, the employer is raising concerns which the employees themselves have not.

4. We will deal with each of the respondent's submissions in turn. The provisions of the *Labour Relations Act* to which reference will be made are as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, con-

duct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

• • •

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

II

5. On an application for certification section 6(1) of the Act gives the Board a broad discretion to fashion the unit of employees appropriate for collective bargaining. As a matter of procedure, the union tenders its proposed unit(s), the respondent employer submits its proposed unit(s), and any intervening employees are entitled to make their representations as well. The Board is under no statutory obligation to accept the unit(s) proposed by any of the parties appearing before it, and has a plenary independent jurisdiction to fashion the bargaining structure it considers appropriate based upon the evidence and representations before it, as well as labour relations policy considerations. Indeed, it is not at all unusual that the bargaining unit the Board ultimately determines to be appropriate will differ from that which one or other of the parties propose, and it is certainly quite common for the unit to differ from that proposed by the union. Under section 6(1) the Board is not bound by the (sometimes polar) positions put by the parties, but is entitled to structure the bargaining unit configuration in accordance with the evidence and the policy considerations which it considers appropriate. Thus, even pursuant to section 6(1), the Board may well decide to fashion two bargaining units when the applicant union seeks only one consolidated unit.

6. In the case of dependent contractors, however, there are additional considerations. Section 6(5) of the Act *deems* a unit of dependent contractors to be appropriate for collective bargaining, even though as a matter of economic reality, dependent contractors (deemed by the Act to be “employees”) may work side by side with those who would be considered “pure employees” on the common law tests. The Legislature has recognized that dependent contractors are something of a “hybrid”, who should be entitled to bargain collectively, but should also be given special treatment. Accordingly, notwithstanding section 6(1) of the Act, the Board *must* find a unit of dependent contractors appropriate for collective bargaining, and can only create a “mixed unit”, when the majority of the dependent contractors support such result.

7. This statutory scheme with its legislative injunctions, is directly applicable to the instant case.

8. The union applied for a bargaining unit, consisting of all “working drivers” (be they owner-operator/dependent contractors or employees) working under the Yellow banner. The union had sufficient support to warrant certification in that bargaining unit if the Board found it to be appropriate; and, of course, as it turned out, the union also had sufficient support to warrant certification if the group were divided into two units. In its decision of November 18, 1987, at paragraphs 55-60, the Board discussed the application of section 6(5) to the facts before it:

55. Section 6(5) deems a unit of dependent contractors to be appropriate for collective bargaining but gives the Board a *discretion* to fashion a “mixed unit” where the majority of the dependent contractors indicate their wish to be associated with other employees for collective bargaining purposes, and the collective bargaining context suggests that this is a sensible thing to do. Implicit in this formula is the suggestion that dependent contractors may well have a different community of interest from other employees which would warrant grouping them into a separate bargaining unit. Those differences flow from the hybrid character of the dependent contrac-

tor as well as the special (and perhaps competitive) relationship with other employees who, as here, may have a degree of dependence on the owner-operator as well as the ultimate "employer" of their services.

56. In the instant case there is no affirmative evidence that the owner-operator/dependent contractors wish to be included in the same bargaining unit as the helper-drivers, and, in our opinion, the structure of section 6 contemplates something more than silence or acquiescence in this regard. "Wishes" are to be canvassed in a positive way - not as suggested here, by the absence of opposition. For example, section 6(1) envisages a representative vote to test employee *wishes* with respect to the bargaining unit configuration. Section 7(2) also refers to employee "wishes" and requires *positive documentary evidence*. Where such evidence is defective or equivocal, the Board will once again seek the confirmatory evidence of a representation vote. These explicit statutory mechanisms suggest to us that the test of employee wishes contemplated by section 6(5) must be satisfied in some positive way - not by silence, negative implication, or non-involvement. It may be only a line on a union membership card to the effect that: "if I am found to be a dependent contractor, I am content to be included in a bargaining unit with other employees"; but it should be at least as clear as that.

57. Here, we have clear evidence that quite a number of employees and dependent contractors want to be represented by the union and engage in collective bargaining. But there is nothing on the face of the documentary or other evidence before us to suggest that the dependent contractors have even considered the question of bargaining unit configuration or expressed their wish to be included in a mixed bargaining unit with other employees.

58. There is also some evidence that the fill-in drivers may have a different community of collective bargaining interests from the full-time owner-operators. If Yellow ultimately controls the fund of available work opportunities, the owner-operators also have a measure of control over the distribution of those work opportunities which they consider to be surplus. An owner-operator may decide to fill in the open spots in his schedule with one helper or three, and is theoretically free to strike a different bargain with each of them. The drivers remain ultimately responsible to Yellow for their performance on the job, but the owner-operator has a degree of control or influence over their job prospects - not least because if the owner-operator is in some way dissatisfied or chooses to work longer hours, s/he can terminate the relationship forcing the driver to look for work elsewhere. Similarly, (although there is no actual evidence to this effect) an owner-operator may admonish a driver for conduct deemed unacceptable (particularly if Yellow expressed that opinion) and could conceivably sever his relationship with a driver for that reason. Finally, the evidence does suggest that owner-operators may provide on-the-job training for new drivers (subject to rules established by Yellow) which may involve some measure of performance assessment.

59. In summary then, we really do not have concrete evidence that the owner-operators wish to be included in a mixed bargaining unit with helper-drivers and there is some indication that those drivers may have a different community of interest which would warrant their inclusion in their own bargaining unit. We should also note that just as there is no evidence that the owner-operators wish to be grouped together with drivers, neither is there any evidence that the drivers wish to be grouped together with the owner-operators with whom they have an economic relationship.

60. In all of the circumstances and given the state of the evidence, we are persuaded that the most prudent course is to designate two bargaining units: one of single car/plate owner-operator dependent contractors whom the statute deems to be an appropriate bargaining unit, and a second unit of other drivers who work within the Yellow system.

Thus, quite apart from the Board's flexible discretion to describe bargaining units pursuant to section 6(1) of the Act, it felt compelled, in the light of section 6(5) and the evidence before it to structure two separate bargaining units: one consisting solely of "dependent contractors" and the other consisting of other drivers working under the Yellow banner.

9. There is nothing in the request for reconsideration which persuades us that this decision was either wrong in law, having regard to the terms of section 6(5), or erroneous as a matter of

labour relations discretion pursuant to section 6(1) of the Act. Indeed, the employer's second submission, to which we now turn, *supports* the proposition that there should be two bargaining units.

10. The respondent's second submission in support of its request for reconsideration is based upon the alleged conflict of interest between "pure drivers" grouped together in one bargaining unit and dependent contractors grouped together in the other one; and we note, once again, that this is not something which the drivers allegedly affected by this supposed conflict of interest chose to raise with the Board, nor is it apparent what legal result should flow from it given the statutory scheme which we are obliged to apply. We do observe that the distinction between "dependent contractors" and "pure employees" is recognized by the statute itself, so it would hardly be surprising if the two groups did not exhibit separate characteristics and a somewhat different community of interest yet at the same time share a degree of mutual dependence. Presumably, that is why the Legislature determined that, *prima facie*, they should be grouped for collective bargaining purposes, in separate bargaining units.

11. The matters raised on this branch of the request for reconsideration were canvassed, at some length, in the Board's decision of November 18, 1987. We see no reason to reproduce that analysis here. It suffices to say that the allegedly anomalous relationship between owner-operators and drivers is implicit in the hybrid concept of the "dependent contractor" and we see no reason, at the instance of the employer, to reconsider or vary the Board's previous decisions. Should individual drivers have complaints about the quality of representation that they are receiving, such complaints can be pursued pursuant to section 68 of the Act.

2624-88-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Applicant v. Humpty Dumpty Foods Limited, Respondent v. The Retail, Wholesale Bakery and Confectionery Workers' Union, Local 461, of the Retail, Wholesale and Department Store Union, AFL:CIO:-CLC:, Intervener

Certification - Practice and Procedure - Trade Union Status -Respondent alleging that applicant had not proven its trade union status - Applicant arguing it was the same organization that had previously been found to be a trade union - Where any deviation in applicant's name from name Board has in its files a hearing will result - In order to benefit from presumption in s.105 an applicant must style itself in exactly the same fashion as the organization which has already been granted "status" - Board satisfied after hearing evidence that applicant could benefit from previous trade union determination - Argument that employees would be misled as to who was the true applicant dismissed

BEFORE: *M. Brian Keller*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *Frank Luce* for the applicant; *E.T. McDermott* for the respondent; *Robert McKay* for the intervener.

DECISION OF THE BOARD; February 28, 1989

1. This is an application for certification.

2. Having regard to the representation of the parties, the Board finds the following unit to be the unit of employees appropriate for collective bargaining:

All office and clerical employees of the respondent in the City of Brampton, save and except supervisors, those persons above the rank of supervisor, statistician, confidential secretary to the General Manager and Sales Manager, confidential secretary to the District Sales Managers and the Controller, plant nurse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in any bargaining unit for which a trade union held bargaining rights as of January 23, 1989.

Clarity Note: It is agreed and understood that for the purposes of the application, the statistician, the secretary to the General Manager and Sales Manager and secretary to the District Sales Managers and the Controller are excluded from the bargaining unit by virtue of being employed within a confidential capacity as it relates to labour relations.

3. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 3, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

4. The respondent alleged that the applicant had not proven that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The applicant took the position that it is the same organization which the Board has already determined to be a trade union within the meaning of the Act even if the nomenclature is not identical.

5. The application reads:

"Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647"

By letter dated January 26, 1989 the Registrar informed the applicant that trade union status had never been granted to any organization so named. The letter further indicated that the Board had found an organization with the name:

"Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America".

6. The Board heard evidence from Mr. Milt Aylivin, President of Local 647, that there is, in fact, only one organization, that the applicant is the same organization as the one previously determined by the Board to be a trade union. He styled the difference as a technical error. He further testified that the Teamsters, Local 647, have an existing relationship with the respondent for another group of employees.

7. Having regard to the evidence, the Board is satisfied that the applicant as described in the style of cause is the same organization which the Board has previously found to be a trade union and, as such, benefits from that previous determination as provided in section 105 of the Act.

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

8. The respondent also makes the point that because the posted Notice made no reference to the Teamsters, employees would be misled as to the true applicant. The evidence is clear, however, that the application cards which the employees signed contain clear reference to the Teamsters as well as reference to "Milk and Bread Drivers, Dairy Employers, Caterers and Allied Employees, Local Union No. 647". As well, given the past relationship at the same site between the applicant and respondent, the Board is satisfied that no confusion resulted from the way the application was styled.

9. No certification order can issue to an organization other than one which has proved to the Board that it is a trade union within the meaning of the Act. Once it has been so proven, however, it need not do so again in cases of further applications. Because of section 105 of the Act, the Board has established a procedure to identify organizations which it has already identified as trade unions. Once an organization has been so identified, the certification process can be speeded up because there is one less issue for the Board to determine. This permits the parties to make use of the "waiver" procedure and, on agreement, avoid a formal hearing before the Board. As a result of the importance the Board places on this matter, any deviation from the name the Board already has on its files as being a trade union will result in the issue of "status" having to be determined. Thus, the applicant will have to prove it is a trade union or it may prove that, in spite of a difference in nomenclature, it is the same organization as a trade union previously granted "status".

10. In order to benefit from the provisions of section 105 of the Act it is incumbent on an applicant to style themselves in exactly the same fashion as the organization which has already been granted "status". Where, as in this case, there is any confusion or deviation, a hearing results. This is unnecessary and time-consuming and may well, depending on the circumstances, have different results from those in this case. Applicants would be best served in ensuring that any application is styled in the correct manner.

11. A certificate will issue to the applicant in respect of the above-described bargaining unit.

1537-88-M Knob Hill Farms Limited, Employer v. United Food and Commercial Workers Local 206, Trade Union

Conciliation - Practice and Procedure - Reference - Trade Union -Trade Union Status - Union Successor Status - Objecting employees permitted to participate in Ministerial reference - Two union locals taking steps to merge - Whether "predecessor" local still in existence so as to be entitled to request a conciliation officer - Board discussing trade union reorganizations - Board finding that union local still existed as a trade union at the time it requested a conciliation officer

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *Michael Gordon* and *Howard F. Wood* for the employer; *Steven Barrett* and *Ethan Poskanzer* for the trade union; *Michael Horan* and *Donna Baydak* for a group of employees.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON;
February 9, 1989

1. Pursuant to subsection 107(1) of the *Labour Relations Act* ("the Act"), the Minister has referred the following question to the Board for its advice:

Does the Minister have the authority to appoint a conciliation officer pursuant to the request from Local 206 in the circumstances of this case?

By decision dated November 8, 1988 we answered that question in the affirmative. These are our reasons for that decision.

I

PREVIOUS PROCEEDINGS

2. On May 23, 1986, the United Food and Commercial Workers Union, Local 206 ("Local 206") applied for certification as exclusive bargaining agent for a unit of employees of Knob Hill Farms Limited ("Knob Hill") at Oshawa, Ontario. Somewhat less than forty-five per cent of the employees in that unit were members of Local 206 at the time referred to in subsection 7(1) of the Act, which was insufficient membership support to permit either certification or the conduct of a representation vote under section 7. Local 206 sought certification under section 8 of the Act, which provides:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

The application was opposed both by Knob Hill and by a group of affected employees represented by Donna Baydak.

3. The application was heard by another panel of the Board over the course of 14 days of hearing in the period from August 5, 1986 to February 19, 1987. In the decision it issued on December 22, 1987 ([1987] OLRB Rep. Dec. 1531), that panel found that Knob Hill had breached the Act in a number of respects, that those contraventions had resulted in a situation in which the true wishes of employees were not likely to be ascertained and that Local 206 had membership support adequate for collective bargaining. It therefore certified Local 206 pursuant to section 8 of the Act.

4. Knob Hill received a notice to bargain on January 15, 1988 in the form of a letter on the letterhead of Local 206 signed by Ron Springall as President of Local 206. The parties were unable to agree on meeting dates. On April 26, 1988, the law firm of Ahee and Associates filed a written request in the name of "United Food and Commercial Workers International Union, Local 175 (formerly Local 206)" that the Minister of Labour appoint a conciliation officer to confer with the parties in an endeavour to effect a collective agreement with respect to the bargaining unit for which Local 206 had been certified on December 22, 1987. That request described the party by whom notice to bargain had been given as "United Food and Commercial Workers International Union, Local 206 (now Local 175)". Knob Hill objected to the requested appointment, initially on the ground that the request was premature but, ultimately, on the ground that United Food and

Commercial Workers International Union, Local 175 ("Local 175") had no bargaining rights with respect to the bargaining unit in question. The Ahee firm responded to this objection in a letter (addressed to the Office of Arbitration to the attention of the Deputy Minister) stating that:

Please be advised that, effective November 1, 1986 U.F.C.W. Local 206 merged with U.F.C.W. Local 175. Local union 175 has trade union status with the Ontario Labour Relations Board. The merger has been recognized in Board File No. 3154-87-R, U.F.C.W. Local 175 - and - Viletta China Canada Limited.

The Minister then referred to this Board the question whether he had authority to appoint a conciliation officer pursuant to the request from Local 175 in the circumstances.

5. That reference ("the first Reference") came on for hearing before a different panel of the Board on July 14, 1988. That panel's decision records that Mr. Ahee, as counsel for Local 175, advised the panel that he would be asking the Board to "make a declaration in the nature of a section 62 declaration that a merger had occurred between the two Locals." The majority of that panel then ruled that this claim for a declaration should be the subject of the delivery of further particulars and of notice to affected employees. Directions to that effect were given, and the reference was adjourned to August 17, 1988.

6. The first Reference came on for hearing before yet another panel of the Board on August 17th. In paragraph 15 of the particulars which had in the meantime been filed by the Ahee firm on behalf of Local 175, it was asserted that as of November 1, 1986, the time when the alleged "merger" of Local 175 and Local 206 had taken place,

Local Union 206 did *not* have bargaining rights for the bargaining unit of employees of the Employer Knob Hill Farms Limited, and therefore the condition precedent for an application under Section 62 of the Ontario Labour Relations Act does *not* obtain.

[emphasis added]

The position then taken by Mr. Ahee on behalf of Local 175 was recorded and dealt with in paragraph 5 of that panel's decision:

5. In answer to our questions, counsel for Local 175 confirmed that the negatives in paragraph 15 of the particulars were intentional and stated that the "time of" the alleged merger was November 1, 1986, more than a year before the decision granting Local 206 certification with respect to the subject unit of employees. When asked to identify the time when Local 175 said that the alleged merger had actually occurred, rather than an effective date as of which the trade union participants may have agreed to "back date" the merger once all conditions precedent to the merger had been fulfilled, counsel again said that date was November 1, 1986. Counsel for Local 175 conceded that if, as it asserted, "the condition precedent for an application under section 62 of the Labour Relations Act does not obtain" then, equally, the condition precedent to a declaration under section 62 does not obtain. He said that his client's claim (in paragraph 16 of its particulars) to a declaration that Local 175 is the successor to Local 206 depended on the proposition that the Board's jurisdiction to so declare is broader under subsection 107(2) than it is under subsection 62(1). He agreed that if this proposition is incorrect we could not declare Local 175 to be successor to Local 206 in the circumstances of this case. All counsel then agreed that we should hear argument with respect to the correctness of this proposition before dealing with the adequacy of notice to employees or hearing any evidence with respect to the purported merger. Having heard and considered that argument, we conclude that counsel's proposition is not correct.

7. After emphasizing the words "... the Board has the same powers and authority as it has under section 62 ... as if an application had been made thereunder ..." in subsection 107(2) of the Act, the panel observed that:

6. ... If the Board has the *same* powers and authority as it would if an application had been made under section 62, then it must follow that it does not have broader or different powers or authority. Counsel for Local 175 asserts that, on its own view of the facts, we would not have the power on an application under section 62 to declare Local 175 successor to the statutory rights and obligations of Local 206 with respect to the subject bargaining unit. That assertion compels us to conclude that we do not have that power in these proceedings.

7. During the course of his argument, counsel for Local 175 made a series of inconsistent and ultimately equivocal statements about whether Local 206 continues to exist or not. Counsel for the employer expressed the belief that there would be other unspecified proceedings between the Employer and some entity purporting to have the right to represent its employees. He suggested that the question whether Local 206 had ceased to exist might have to be answered in those proceedings. Given the way the issues before us have developed, we do not have to answer that question in this proceeding. Furthermore, the conclusions expressed in this decision do not depend on any particular view of the possible outcome of, for example, an application to the certification panel by either the Employer or Local 175 requesting reconsideration of the certification decision.

8. The collective agreement referred to in subsection 16(1) of the Act is a collective agreement which would cover a particular bargaining unit of employees; the word "parties" in that subsection means the employer of those employees and the trade union which has the right under the Act to act as their exclusive bargaining agent. The Board's decision of December 22, 1987 certified Local 206 to be the exclusive bargaining agent of the unit of employees with which the application for conciliation services is concerned. We are not asked to reconsider that decision. Local 175 does not claim to be one and the same trade union entity as was certified in that decision. Since we cannot declare Local 175 to be successor to Local 206's statutory right to serve as exclusive bargaining agent in the face of the assertions and concessions of its counsel, we must conclude that Local 175 is not a party within the meaning of section 16.

The panel's answer to the question in the first Reference was in the negative:

9. Section 16 does not give the Minister authority to appoint a conciliation officer at the request of anyone other than a "party." Having concluded that Local 175 is not a "party", it is our respectful advice to the Minister that the Act does not authorize the Minister to appoint a conciliation officer at the request of Local 175 in the circumstances of this case.

8. By application dated August 25, 1988, "United Food and Commercial Workers International Union, Local 206" requested that the Minister appoint a conciliation officer to confer with the parties in an endeavour to effect a collective agreement with respect to the terms and conditions of employment of employees in the bargaining unit for which Local 206 was certified. That request was signed on behalf of Local 206 "by its solicitors, Sack, Charney, Goldblatt & Mitchell." By letter to the Registrar dated August 26, 1988, Mr. Mitchell of that firm requested on behalf of Local 206 that the Board reconsider its decision in the certification application and substitute the name "United Food & Commercial Workers' Union, Local 175" for the name "United Food & Commercial Workers Union, Local 206". His letter noted that this request for reconsideration was "without prejudice and in the alternative to the request being made to the Minister of Labour for the appointment of a conciliation officer", that he anticipated objection by the employer to the appointment of a conciliation officer and that the Minister had therefore been asked to refer the matter to the Board under section 107(1) if he deemed it necessary. The request for appointment of a conciliation officer was opposed by the employer, and the reference with which we are now seized (at least in part) was directed to the Board by the Minister.

9. Both the request for reconsideration of the certification decision and the Minister's reference were initially scheduled for hearing before the panel which made the certification decision. One of the members of that panel had ceased to be a member of the Labour Relations Board after the hearing of the certification application began. Accordingly, while that panel could deal with the request for reconsideration of its decision (see section 102(7) of the Act) it could not deal with the

Minister's reference. That panel began its hearings with respect to the reconsideration request. The reference for the Minister was rescheduled, and came before this panel for consideration.

II

REQUEST BY GROUP OF EMPLOYEES FOR STANDING

10. Mr. Horan appeared as counsel for Ms. Baydak, seeking the right to participate in the Board's consideration of this reference as representative of the group of employees of whom Ms. Baydak had been the representative in the certification proceedings. This request was opposed by counsel for Local 206, who argued that the proper parties to any dispute over the Minister's authority to appoint a conciliation officer are the parties to the collective bargaining in respect of which the request for appointment is made. Counsel for the objectors argued that the real issue on this reference was whether the entity which had made the request for appointment had bargaining rights with respect to the unit of employees which included them. From that perspective, he argued, the employees in the bargaining unit affected should be given the same standing as they would be given in certification, termination, successor rights and single employer applications in which the Board deals with bargaining rights.

11. Although the Board's answer to the Minister's question is referred to as a "decision" in section 107, the Board's role under that section is of a quite different legal character than the role it performs under other provisions of the Act. As the Board noted in *Spar Aerospace Limited*, [1985] OLRB Rep. Mar. 480 at paragraph 24:

The Board's role on a Reference, like that of a court in similar circumstances, is advisory (see *R. v. Ontario Labour Relations Board, ex parte Kitchener Food Market Ltd.*, [1966] 2. O.R. 513 (Ont. C.A.)). The Minister is not obliged by law to follow the Board's decision. That decision is not determinative of the rights of the parties who would be affected by a Ministerial appointment, other than in the practical sense that on an issue which the Board would have jurisdiction to determine *inter partes* - the application of section 63, for example - those parties (and the Minister) could fairly expect that if the same issue arose in an application involving the same parties, the Board would respond identically to identical facts.

From that perspective, it might be said that no one has any legal *right* to participate in proceedings taken by the Board to assist it in formulating its advice to the Minister. Even in proceedings in which certain persons do have the right to notice and the opportunity of a hearing, the Board has a discretion to permit participation by those who do not have such a right: see *Great Lakes Forest Products Ltd.*, [1987] OLRB Rep. Sept. 1136; and, *Ontario Hydro*, [1986] OLRB Rep. May 663 at paragraph 20 and following.

12. Counsel before us, including counsel for the objecting employees, already had some familiarity with the issues in this reference, having discussed them earlier in the context of the application for reconsideration in which the objecting employees were and are proper parties. Counsel for the objecting employees was able to assure us that his participation would not introduce into the evidence gathering portion of our proceedings any disputed issue of fact which would not otherwise be addressed by the trade union or employer. Following a discussion about the possibility that issues addressed in the reference proceedings before us might also be raised in a request for reconsideration of the original certification application (either the pending request or, if that request were withdrawn by the trade unions involved, a request which might be filed by the objecting employees), counsel for the objecting employees undertook that they would be bound by this panel's decision with respect to the issues addressed in these proceedings. In those circumstances, we permitted the objecting employees to participate, through counsel, in these reference proceedings.

III

THE FACTS

13. For the most part, the facts relevant to the question posed by the Minister are not in dispute. Local 206 and Local 175 are both locals of the United Food and Commercial Workers International Union (hereafter referred to as "UFCW" or "the parent union"). Under the UFCW's constitution, the officers of the parent union constitute the International Executive Board. Under Article 8(J) of the constitution, the International Executive Board has the power "to authorize the voluntary merger of Local Unions of the United Food and Commercial Workers International Union or of an organization not chartered by the United Food and Commercial Workers International Union into a Local Union of the United Food and Commercial Workers International Union". Article 8(G) of the constitution permits the International Executive Board to delegate any of its specific powers to the International Executive Committee or to the International President for exercise between meetings of the International Executive Board. On August 5, 1983, the International Executive Board passed a resolution delegating to the International Executive Committee of the parent union certain specific powers of the International Executive Board, including the power to authorize voluntary mergers of local unions under Article 8(J). "Merger" is not defined in the constitution.

14. In May 1986, the International President and International Secretary-Treasurer wrote to the Secretary-Treasurer of Local 206 granting it permission to enter into merger discussions with Locals 175, 409 and 486. It is not apparent whether such permission is, in fact, necessary under the UFCW constitution. The significance of the letter is that it enclosed what the letter referred to as "the UFCW merger procedure", a document to which considerable reference was made in argument. That document reads as follows:

UNITED FOOD AND COMMERCIAL WORKERS

INTERNATIONAL UNION

Merger Procedure

The following steps are to be followed by UFCW chartered bodies contemplating merger.

- 1) Informal, exploratory discussions between potential merging bodies.
- 2) The chief executive officers of chartered bodies informally discussing merger should request that the International Executive Committee approve their formalizing merger discussions. (Letter to International President for International Executive Committee with copies to Regional office(s).)
- 3) The International President will request a recommendation from Regional Director(s) regarding such discussions continuing.
- 4) Director(s) make recommendation on proposed formal merger discussions ensuing.
- 5) If authorized by the International Executive Committee the International President assigns Regional Director(s) to assist chartered bodies in completing merger.
- 6) Chartered bodies draft merger resolution (UFCW -- through the Regional Director -- provides sample merger resolution language).
- 7) Executive Boards of chartered bodies recommend merger agreement to membership.
- 8) Members shall receive formal notice of a membership meeting at which there will be

full disclosure of the terms of the merger agreement. There shall be an opportunity for full discussion of the merger at this meeting. Members shall receive formal notice of a membership meeting at which the merger resolution shall be voted upon. The discussion and the vote may be done at one meeting, in which case, the notice shall indicate there will be full disclosure of the terms of the merger agreement, an opportunity for full discussion, and a vote. (Formal notice as used in the Merger Procedure is usually written notice mailed to each member not less than fifteen days prior to the meeting. In some cases, where notice has been traditionally and effectively provided by postings as, for example, in some single plant locals, this may suffice.)

(See the attached respecting union's obligation to nonmembers and their voting rights.)

- 9) Chartered bodies' memberships vote by secret ballot to approve merger agreement.
- 10) Chartered bodies submit Resolutions and conditions of Merger to the Regional Director for transmittal to the International President for the International Executive Committee.
- 11) Director(s) make recommendations to the International Executive committee through the President's office regarding proposed merger.
- 12) International Executive Committee approves or disapproves proposed merger.
- 13) International President and Secretary-Treasurer notify the chartered bodies of Executive Committee decision and, if approved, provide detailed instructions regarding consummation of the merger.
- 14) All records, collective bargaining agreements, assets, properties, and liabilities shall be transferred to the merged body.
- 15) The charter and seal of the chartered body(ies) going out of existence shall be surrendered to the International Union.
- 16) The chartered body(ies) going out of existence sends copies of terminal LM report(s) and terminal 990 report(s) to the International Secretary-Treasurer.

The reference in parentheses at the end of paragraph 8 is to an attachment not before us, which apparently sets out obligations and rights which the UFCW understands exist under U.S. law but does not treat as applicable in Canada.

15. On August 8, 1986, the Presidents of Locals 175, 206, 409 and 486 of the UFCW agreed in writing to recommend to their respective Executive Boards that they adopt the following resolution:

RESOLUTION AND CONDITIONS OF MERGER BETWEEN UFCW LOCAL NO. 175 AND UFCW LOCAL NOS. 206, 486, AND 409

WHEREAS, conferences have taken place between the executive officers and representatives of UFCW Local Nos. 175, 206, 486, and 409, for the purpose of achieving ways and means of merging the Locals to achieve greater efficiency and stability and to enhance the best interests of the membership and promote the general welfare, and

WHEREAS, substantial progress has been made in achieving such purpose and each Executive Board and Local Union has been fully advised as to details involved, as attached hereto (Exhibit A), and has fully considered the formal conditions of merger and the proposed bylaws attached hereto (Exhibit B), and

WHEREAS, the Executive Boards of UFCW Local Nos. 175, 206, 486, and 409 on August —,

1986, after appropriate notice, considered all particulars in connection with said merger and recommended concurrence to the membership of the Local Unions, and

WHEREAS, the membership of UFCW Local Nos. 175, 206, 486, and 409 were notified that this matter would be voted upon at the meetings of the Local Unions during August, September and October, 1986, and

WHEREAS, at the aforementioned membership meetings, this resolution and the Exhibits attached hereto were read, and the issue of the merger under the terms and conditions set forth herein was fully discussed, all members present having been given an opportunity to express themselves fully and freely on the subject of the merger, the matter was put to vote and was approved by a requisite majority vote, and

WHEREAS, the adoption of this resolution and the attached Exhibits authorised and instructed the Chief Executive Officers and Executive Boards of the Local Unions to take all necessary steps to effectuate the merger in accordance with the approved terms and conditions embodied herein and acknowledge and agree that UFCW Local No. 175 would then be the successor Local Union in all respects, therefore,

BE IT RESOLVED, that this resolution and the exhibits attached hereto shall constitute a formal merger agreement, subject to final approval by the United Food and Commercial Workers International Union, and

BE IT FURTHER RESOLVED, that after the merger is approved by the United Food and Commercial Workers International Union, that

a) the appropriate officers shall be authorized and are hereby instructed to do all things necessary to expedite the merger, including the transfer and assignment of all property, funds, books, records, other assets and obligations of UFCW Local Nos. 206, 486, and 409 to the successor Local Union, and

b) that the successor Local Union notify employers under contract (Exhibit C) and other interested persons (Exhibit D) of the merger action and that UFCW Local No. 175 is in all respects the successor of UFCW Local Nos. 206, 486, and 409 and as such successor is subject to the obligations and entitled to the rights and privileges of the contracts as well as all other rights and privileges inhering to UFCW Local Nos. 206, 486, and 409 and that the contracts shall be amended to show UFCW Local No. 175 as the successor Local Union in all respects.

16. In the material before us there are a number of notices of membership meetings scheduled for the period contemplated in the fourth recital of this resolution. There is general agreement that meetings contemplated by those notices were held. The unions' assertion that the resolution was approved at those meetings is unchallenged. The copy of the merger resolution before us bears the certificate of the President and Secretary-Treasurer of each of Locals 175, 206, 486 and 409 to the effect that "this resolution and its exhibits attached hereto and made part thereof were adopted by UFCW Local Union Nos. 175, 206, 486, and 409 as stated herein." It is common ground, however, that those employees of Knob Hill who had become members of Local 206 were not given notice of and did not attend any such meeting.

17. Exhibit A to the merger resolution begins as follows:

EXHIBIT A

Exhibit A shall set forth conditions of merger not contained in the resolution itself or in Exhibit B (Bylaws).

The conditions of merger shall include the following:

- 1) The officers and employees of the merged Local Union, or any other person holding any assets of the merged Local Union, shall be empowered and authorized, and may

be required from time to time, on and after the effective date of this merger, to execute and deliver, or cause to be executed and delivered, upon the request of the successor Local Union (UFCW Local 175), all such deeds, documents, authorizations or instruments as may be necessary, appropriate or indicated in order to convey, transfer or confirm the right, title and interest of the successor Local Union (UFCW Local 175) in and to such assets or property.

- 2) The successor Local Union (UFCW Local 175) shall also assume all obligations of the merged Local Union of every kind and character, including collective bargaining obligations, and shall succeed to every and all rights and privileges of the merged Local Union as of and subsequent to said date.
- 3) On the effective date of this merger, the members in good standing of the merged Local Union, as of said date, shall become and remain members in good standing of the successor Local Union (UFCW Local 175) without payment of any initiation or transfer fee. The accumulated membership standings of the members of the merged Local Union shall be considered, for Local Union purposes (excepting sick and death benefits), the membership standings in the successor Local Union (UFCW Local 175) and shall be reflected in the membership records thereof.
- 4) The merger shall not be deemed to impair or otherwise affect any Federal or Provincial certification of the merged Local Union as a collective bargaining representative or agent, or any right or obligation of the merged Local Union under any collective bargaining agreement for checkoff authorizations; but, all rights, privileges, duties and responsibilities vested in the merged Local Union, pursuant to such certifications, agreements or authorizations are to be deemed vested in the successor Local Union (UFCW Local 175).
- 5) Such health and welfare trust and pension trust to which the merged Local Union is a party shall not be deemed to be altered by virtue of this merger, all rights, directions of powers of appointment vested in the merged Local Union shall become vested in and exercisable in the successor Local Union (UFCW Local 175) acting by and through its appropriate officers or Executive Board.
- 6) The officers of the merged Local Union are directed and instructed to take any and all necessary and indicated steps to fulfill the provisions of this Agreement and shall serve in their respective official capacities until the effective date of the merger at which time their official terms of office shall expire.
- 7) The duly elected officers of the successor Local Union (UFCW Local 175) hereby accept all of the rights, duties and obligations imposed upon each of them and upon the successor Local Union herein.
- 8) The merger shall be effective on the first of the month following ratification by the requisite majority vote of each of the Local Unions.
- 9) The merger agreement and Exhibit A shall stay in place until December 31, 1995.

Paragraph 10 of Exhibit A sets out the provisions which will govern the election of officers in which is described as “the successor Local Union (UFCW Local 175)” for the successive terms of office beginning in January 1989 and January 1993. It provides that until January 1, 1989, the Executive Board of Local 175 would consist of the then Executive Board members of Locals 175, 206, 409 and 486. Provision is made for the appointment of the Presidents of Local 206, 486 and 409 as Regional Directors/Executive Vice-Presidents of Local 175 (paragraph 12). Paragraphs 11 through 15 deal further with the election or appointment of officers of the “successor Local Union”. Paragraph 16 deals with the frequency of meetings of the Executive Board, Executive Committee and general membership. Paragraph 17 deals with the rationalization of amounts payable by way of union dues and initiation fees. Paragraph 18 deals with regional per capita tax payable by Local 175 to Regional Councils. Paragraph 19 provides that:

All strike funds which exist in Locals 175, 206, 486, and 409 shall be merged upon the effective date of this merger agreement and shall be financed in the future by a 20¢ per member per week contribution (or such amount as may be approved by the membership in the future). The monies from the various strike funds and the revenue generated for the strike fund shall be deposited in a strike fund as determined by the President of the Local Union.

18. Concerning Local 206's failure to involve the Knob Hill members in a vote on the merger resolution, Mr. Springall testified that those members were MACCs (members awaiting contracting coverage) who do not pay dues and are not treated as having active membership status. Mr. Springall's attention was drawn in cross-examination to the "Bylaws of Retail, Commercial and Industrial Union Local 206", which Mr. Springall had testified represented the bylaws of Local 206 in effect at all relevant times. Article IV, section B defines an active member as including a member who is employed within a collective bargaining unit represented by the Local union or who is employed by an employer who is the subject of an active organizing effort by the local union. Mr. Springall said that the only persons treated as active members were members covered by a collective agreement under which dues were being remitted on their behalf to the union. He testified that the concept of MACCs and their limited rights was not something which could be found in the constitution of the parent union or the bylaws of the Local but was, rather, an "internal procedure used strictly in Canada". While they have that status, he said, MACCs are not required to pay dues, something which active members are required to do. (We note that Article IX, section D of the Local 206 bylaws contemplates the suspension of a member who does not pay dues for two consecutive months, as does the UFCW constitution. The provisions of the Local 206 bylaws regard a suspended member as a member who is not in good standing. Article VI, section F contemplates that only active members in good standing are entitled to vote on a matter which comes before a membership meeting.)

19. One of the documents before us is a letter dated March 6, 1987 from the International Presidents and International Secretary-Treasurer of the parent union to Ron Springall, Executive Vice-President UFCW, Local No. 175. It reads as follows:

Resolutions received at International headquarters indicate that the memberships of Locals Nos. 175, 206, and 409 and that portion of Local No. 486 which is in Ontario have agreed to merge with each other.

The International Executive Committee has approved this merger, which is effective as of November 1, 1986. The newly merged local union will be known as United Food and Commercial Workers Union, Local No. 175, and the geographical jurisdiction of Local No. 175 will be the Province of Ontario. Local No. 175 will continue to be assigned to Region 18.

It will be necessary to have the charter of Local No. 206 so that we can issue a revised charter reflecting this merger. If you desire to retain the old charter for posterity, please advise us and it will be returned after it has been invalidated.

The following detailed instructions should be followed in order to consummate the merger:

1. You, as former chief executive officer of Local No. 206, will need to send, if you have not already done so, Willard E. Hanley, President of Local No. 175, a letter wherein you advise that effective November 1, 1986, the following actively employed members of former Local No. 206 have been transferred to Local No. 175. (Then proceed to list the names of all the members being transferred.)

2. You are to transfer all of the local union's funds, savings, bonds, etc., to Local No. 175.

3. You must also return to the Secretary-Treasurer's office the charter and seal of former Local No. 206. The minutes, records, contracts, supplies, etc., are to be transferred to Local No. 175.

4. Any membership reports that may be past due should be forwarded to us as soon as possible. On the top of the first page of each of these reports, please write "Membership transferred to Local No. 175, effective as of November 1, 1986."

We are sending Willard E. Hanley, President of Local No. 175, a copy of this letter in order that he may be fully informed. If you have any questions concerning the procedure that we have outlined herein please do not hesitate to contact us.

20. In addition to those matters which appeared on the face of the many documents put before us on agreement of the participants, counsel for the employer and counsel for the objecting employees accepted as true the assertion of Local 206 that if a conciliation officer was appointed with respect to bargaining between Knob Hill and Local 206, Mr. Ron Springall would have sufficient financial resources from the International Union to be able to bargain with Knob Hill on behalf of the employees and Local 206 and to represent them. They also agreed that there are two collective agreements still in effect under which Local 206 is named as bargaining agent: an agreement with Tilden Car Rental Inc. dated April 18, 1986 with an initial term ending November 30, 1988; and, an agreement with Canteen of Canada Limited dated October 20, 1986 covering the period January 1, 1986 to December 31, 1988.

21. There were two assertions of fact by counsel for Local 206 with which counsel for the other participants disagreed. One was the assertion that the charter issued by the parent union to Local 206 had neither been surrendered nor revoked. The other was the assertion that there had been "no internal administrative transfer of employees at Knob Hill who are members of Local 206 over to Local 175; that is, that there had been no advice to Local 175 by a membership clerk that these individuals are now members of Local 175". In that connection, each of the other two counsel indicated that he had a document which appeared to be inconsistent with this assertion. Counsel for the objecting employees referred to a notice to Knob Hill employees or members (the notice does not say which) of a meeting to be held July 11, 1988 to discuss contract proposals and nominate and elect a negotiating committee. This notice is on the letterhead of Local 175. Counsel for the participants all agree that this document was handed out to employees in the subject bargaining unit by someone with some connection with the UFCW or one of its Locals on or about July 11, 1988. Counsel for the employer produced a letter dated July 6, 1988 on the letterhead of Local 175, signed by one Andrew Birnie and addressed to Knob Hill. It complains that certain disciplinary action taken against a named individual was not consistent with past practice and would be the subject of a complaint to this Board if not satisfactorily resolved. Counsel for the participants agree that this document was sent by its apparent author on or about July 6th and received by the addressee shortly thereafter.

22. Ron Springall testified for Local 206. He was elected to the Executive Board of Local 206 in 1972. He became a full-time representative of the Local in 1979. In 1982 he was elected President of Local 409 in Thunder Bay. In 1985, the Executive Board of Local 206 appointed him to the office of President of the Local, to fill a vacancy which had arisen since the previous elections. But for any effect the "merger" may have had, the term of the office to which he was then appointed would ordinarily have expired December 31, 1988, as would the terms of others who held office in the Local at the time he was appointed President. Mr. Springall is also a Regional Director and Executive Vice-President of Local 175, positions he had held since November 1, 1986.

23. Mr. Springall identified the charter which had been in the possession of the Local at the time he became President. It is a charter dated July 1, 1984, constituting certain persons a Local union under the title of "United Food and Commercial Workers Union, Local No. 206", the affairs of which are required, by the terms of the charter, to be conducted in conformity with the

constitution of the UFCW. He testified that the charter had remained in his possession since he became President. It had not been surrendered, he said, nor had the International Union purported to revoke it.

24. In cross-examination, Mr. Springall testified that he never received the letter of March 6, 1987 purportedly sent to him by the International President and International Secretary-Treasurer. The first time he saw it was in July of 1988, when Mr. Ahee was preparing him to testify in connection with the earlier reference under section 107. Upon becoming aware of the contents of the letter and the "instructions" set out in it, he spoke to his immediate superior, Mr. Evans, to ask what he should do in view of the fact that there were still outstanding matters involving Local 206. He was told, in effect, to await further instructions. He later received a letter dated September 1, 1988 from the International President and International Secretary-Treasurer, to the following effect:

We are writing you further to an agreement entered into between Locals 175, 206, and 409, which have agreed to merge with each other.

As you are aware, the International Executive Committee has approved this merger. Further, as you are aware of by letter dated March 6, 1987, we forwarded to you detailed instructions which were to be followed in order to consummate the merger. Included among these instructions was the requirement that you return to the International Secretary-Treasurer's Office the charter and seal of Local 206.

It is our further understanding that difficulties have arisen with respect to the orderly merger between Locals 206 and 175, and in particular, with the ability of Local 206 to transfer bargaining rights from Local 206 to Local 175 with respect to a bargaining unit of employees employed by Knob Hill Farms Limited.

The International Executive committee is of the view that all steps taken which are necessary in order to consummate the merger should not be completed unless and until an orderly transfer of bargaining rights to Local 175 has taken place with respect to all bargaining units which Local 206 represents. As a result, we would ask that you not return the charter and seal of Local 206 unless and until the local is assured that all bargaining units which it represents, including the bargaining unit certified for Knob Hill Farms Limited, may be adequately represented by Local 175.

In the interim, Local 206 and its officers shall have all powers necessary in order to represent those employees whose bargaining rights have not been transferred to Local 175, and to take all necessary steps in order to effectuate such transfer. Once all such transfers have occurred, we would ask that you follow the detailed instructions set out in our letter dated March 6, 1987, in order to fully consummate the merger.

We issue this letter with the full authority of the International Executive Committee who have authorized the conditions set out herein.

25. Mr. Springall acknowledged that while he had not been aware of the letter of March 6, 1987 until some time later, he had been aware of the merger procedure set out in the document which Local 206 received in May of 1986. He was aware that that procedure contemplated the surrender of the charter. He said it had been his understanding that it was and remained his obligation after November 1, 1986 to take the steps necessary to accomplish what the merger agreement contemplated. That included arranging the transfer to Local 175 of bargaining rights with respect to each of the bargaining units for which Local 206 held such rights. That had generally occurred without difficulty: when an existing agreement with Local 206 expired, the employer party would generally agree to Local 175 as the trade union party to the renewal agreement. Of more than 80 bargaining units under contract in October 1986, all but two had since been "switched" by one means or another to Local 175. Tilden and Canteen, the employer parties to the two agreements in

which Local 206 was still the named bargaining agent, had indicated they would have no difficulty substituting Local 175 as bargaining agent if that proposal were made when it came time to negotiate the renewal of those agreements. Mr. Springall could not be certain, however, that there would not be difficulties at that point, as there had been with Knob Hill's accepting that Local 175 should act as bargaining agent in place of Local 206.

26. Apart from its continuing responsibilities with respect to the Tilden, Canteen and Knob Hill bargaining units, Mr. Springall observed that Local 206 also was involved in outstanding proceedings or negotiations with respect to the rights of certain former employees of Dominion Stores under the *Employment Standards Act*. It was Mr. Springall's understanding of the merger agreement and his function under that agreement that he was to continue to act in the name of Local 206 so as to cause it to discharge its obligation to represent workers and complete all such steps as might be necessary to have those obligations taken over by Local 175. He understood that a surrender of the charter of Local 206 would terminate the Local's existence and leave those employees in limbo. He did not propose to surrender the charter, nor did he understand the agreement to require that it be surrendered, until all necessary steps had been taken to give effect to the provisions of the merger agreement. All such steps have not yet been taken, in his view.

27. With respect to the membership status of employees of Knob Hill who originally became members of Local 206, Mr. Springall explained the procedure involved in the transfer of members from one Local to another. Each Local files reports with the International concerning its membership, including information about incoming members, outgoing members and members awaiting contract coverage ("MACC's"). In respect of a transfer of membership, then, both the original Local and the destination Local would report on the transfer. Mr. Springall testified that neither Local 206 nor Local 175 has reported members employed by Knob Hill as having been transferred from the one to the other. Local 206 had approximately 4400 members as of November 1, 1986. Most of these were thereafter transferred to Local 175. Apart from the approximately 100 members employed at Knob Hill, certain members formerly employed by Dominion Stores have also not been transferred. Mr. Springall was not sure whether the employees covered by the Tilden and Canteen agreements were still technically members of Local 206.

28. Mr. Springall readily acknowledged in cross-examination that a great many of the steps contemplated by the merger procedure and by the merger agreement had been completed. All of Local 206's bank accounts had been closed and the contents transferred to Local 175 in late 1986, including a strike fund of approximately five to six thousand dollars. The only capital assets of Local 206 of any monetary value which were not transferred to Local 175 at that time were the assets of the Local 206 building corporation, which were transferred to Local 175 in some fashion in mid-October 1988. After November 1, 1986, any dues received by Local 206 were deposited in the bank account of Local 175. Local 206 ceased to have any paid employees on November 1, 1986; Mr. Springall and the other former employees of Local 206 were thereafter employed and paid by Local 175. The officers of Local 206 had become officers of Local 175 in accordance with the provisions of the merger agreement in that regard. Apart from Mr. Springall, none of the persons who held office in Local 206 prior to the effective date of the merger agreement has since purported to act in his or her capacity as an officer of Local 206. No meetings of the Executive Board of Local 206 as such have been conducted since October 1986. Asked how he could have continued to be President of Local 206 after November 1, 1986 in the face of paragraph 6 of Schedule A to the merger resolution, Mr. Springall testified that it had been his understanding of the document he signed that he had to complete the steps which the document contemplated would be taken and that it was impossible to complete those steps by November 1, 1986.

29. Mr. Springall testified that he knew all of the employees of Local 175 and that Andrew

Birnie was not, to his knowledge, employed by that Local. He did not know who Andrew Birnie was. He felt he would be aware of the identity of any person assigned by Local 175 to deal with any matter involving the Knob Hill bargaining unit. Mr. Springall was unable to say from personal knowledge what might have been in the minds of others when they used Local 175 letterhead in connection with matters involving Knob Hill employees or members. One such document was a letter written to Knob Hill's solicitors by Jim Hastings, a Local 175 business representative, proposing dates on which "the union" was prepared to meet in negotiations for the purpose of negotiating the terms of a collective agreement. The letter is on Local 175 letterhead and is captioned "Re: UFCW Local Union 175 and Knob Hill Farms Limited". Mr. Springall noted that Mr. Hastings had been designated by the President of Local 175 as the person who would negotiate with Knob Hill Farms. Mr. Springall did not know why Mr. Hastings would not have written on Local 206 letterhead. He volunteered, however, that it would be logical for Mr. Hastings to assume he was negotiating on behalf of Local 175 because Mr. Hastings is paid by Local 175 and works in that Local's office.

30. Mr. Springall's attention was directed to three letters dated February 11, 1988 and addressed to him as President of Local 206. One is on the letterhead of Local 175 and signed by W. E. Hanley as President of that Local. The other two are on the letterhead of the UFCW; one is signed by W. E. Hanley as International Vice-President and Director of Region 18 and the other is signed by Clifford Evans as International Vice-President and Director of Region 19. The body of each letter is identical, and reads:

Pursuant to the Resolutions passed by the delegates at special meetings of the above-named Local Unions, and pursuant to the Memorandum of Agreement duly executed by the Presidents and Secretary-Treasurers of said Local Unions, I am writing to formally recognize the Merger of Local Unions 206, 409 and 486 with Local Union 175.

We hereby accept into the membership of Local Union 175, all former members of Locals 206, 409 and 486 and point out that they enjoy all the rights, duties and obligations as do all members of the United Food and Commercial Workers Union, effect [sic] November 1, 1986.

31. Mr. Springall testified that he was aware of these letters. He was firmly of the view that none of the authors of them had the authority to do what they purported to do in those letters. He said he understood these letters were written for use by Mr. Ahee on an application to the Board involving Viletta China Canada Limited. We note that was an application to the Board in which Local 175 sought a declaration that Local 175 had acquired the rights, privileges and duties of Local 206 with respect to a unit of employees of that employer. That application was dealt with by another panel of the Board, which granted it. That panel noted in its decision granting the requested declaration that notice of the application had been given to the employer and to the effect that employees and none of those interested persons had sought to oppose or otherwise make representations in connection with the application.

IV

REASONS FOR DECISION

32. The submissions of counsel for the respondent and for the objecting employees involved variations on three basic themes: that Local 206 had ceased to exist, that Local 206 was no longer a trade union within the meaning of the Act and that Local 206 was not now the trade union to which the Board would have thought it was granting exclusive bargaining rights in the decision of December 22, 1987. These themes and variations of them were explored from two legal perspectives: the perspective of the common law as it applies to the affairs of unincorporated associations

and the perspective of the *Labour Relations Act* as it applies to the acquisition and performance by trade unions of statutory rights and obligations as exclusive bargaining agencies.

33. The nature of trade unions from the common law perspective was described in the following passage from the judgement of the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, [1970] 1 O.R. 129, 69 CLLC ¶14,198 (Ont. C.A.) at pp. 133-134 and 135:

Prior to dealing with the merger agreement I consider it desirable to determine the precise legal status of a trade union or labour union, the relationships existing among the membership *inter se* and the relationships of each member to the totality of the persons associated together. I concede at the outset that a labour union under the *Labour Relations Act*, R.S.O. 1960, c. 202, and allied legislation has a "status" conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relations to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

The proposition that a trade union has a special status, that it is a sort of hybrid corporation, has no foundation in law. This misconception is fostered by the "legal entity" character which labour legislation has thrust upon trade unions but is not legally supportable outside the purview of those statutes. While trade unions have historically strenuously opposed and rejected any movement toward corporate status with its attendant strictures, there has evolved a concept, which has no basis in law, that unions has a *quasi*-legal entity; that they have a peculiar status which clothes them with the advantages of corporations but shields them from the restrictions and liabilities attaching to corporate entities. The misunderstanding, and it is a fundamental one, must not be allowed to becloud the issues herein.

We are not concerned in this appeal with the pseudo-corporate status bestowed on labour unions by statute; nor are we assisted by English case law in view of the fact that under various Trade Unions Acts, trade unions in England may be registered and upon registration are vested with certain powers and responsibilities. Ontario has no comparable legislation and resort must be had to the common law to determine both status and capacity. Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelled out in the memorandum of association usually referred to as the "constitution"; the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill, Rand, J., in *Orchard et al. v. Tunney*, [1957] S.C.R. 436 at p. 445, 8 D.L.R. (2d) 273 at p. 281, stated:

... each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that the rules shall bind them in their relations to each other.

I adopt also the proposition stated by Thompson, J., in *Bimson v. Johnston et al.*, [1959] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1958] O.W.C. 217, 12 D.L.R. (2d) 379:

... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the unions constitution and by-laws ... The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.

There is no limit to the lawful objects for the furtherance of which men may associate voluntarily, and in my view, provided it is properly authorized by every member of the association, there is no restriction upon the powers of the members to alter the objects for which they became associated or to terminate the relationship *inter se* of those associated, or to agree individually to become bound by other contractual relationships to the members of the same or some other group of associates. In this sense of the meaning of *ultra vires* I do not consider that the realization of what was contemplated by the provisions of the merger agreement would be beyond the capacity of the members of Mine Mill provided that there was unanimous approval individually or by means of some procedure which all of the members had agreed upon.

The contract of association is not between the members and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union. These are individual contracts impressed with rights and obligations which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected thereby.

Two features of this perspective are significant for our purposes. One is that the only matter essential to the existence of an unincorporated association is that the terms of a complex of contracts or constitution have been subscribed to by two or more persons. The other feature is that once the association has been created in this way, it cannot be taken out of existence except in accordance with the express terms of its constitution or with the unanimous consent of all those then bound by those terms.

34. The *Labour Relations Act* defines “trade union” in clause 1(1)(p):

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

It is not the Board’s function to “confer” or “withhold” “the status of a trade union”, as the language used in older Board decisions suggests. An entity or group of persons either is or is not a trade union, depending on whether the statutory definition is satisfied. The Board’s function is to make a finding of fact. In doing so, it is obliged not to impose requirements unsupported by the language of clause 1(1)(p); *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.) (“the CSAO decision”).

35. The word “organization” in clause 1(1)(p) is not itself expressly defined. The language of the clause and of other provisions of the Act provides guidance as to what is meant. Clause 1(1)(p) tells us that it is an organization “of employees”. Clause 1(1)(l) and other provisions of the Act clearly contemplate that it is an organization of which employees are “members”. Sections 74, 87, 91, 92, 98, 99 and others contemplate that a trade union will have at least one “officer, official or agent” who acts or purports to act on its behalf in matters with respect to which the Act is concerned. Clause 1(1)(p) contemplates that the organization is something which is “formed” for particular purposes. These characteristics - membership within a formal structure with defined purposes and action through agents - suggest that the “organization” must either be a corporation without share capital created pursuant to some statute in that behalf or an unincorporated association brought into existence in the manner contemplated by the common law.

36. Some unions in Ontario are corporations; most are unincorporated associations. As the Court recognized in the passage from *Astgen et al. v. Smith et al.*, *supra*, a trade union which is an unincorporated association takes on a pseudo-corporate status under the *Labour Relations Act* and other labour legislation, which treat it as having a separate existence and identity even though it has none at common law. The statutory perspective works some other modifications on the common law view of unincorporated association. For example, an individual who is not yet and might

never be a member of the association in accordance with the provisions of its constitution may nevertheless be treated as a member for the purpose of the *Labour Relations Act*: clause 1(1)(l) and subsection 103(4) of the Act. Subject perhaps to those modifications, the question whether something exists as an “organization ... formed for purposes that include the regulation of relations between employees and employers” is governed by the common law principles to which the Court of Appeal made reference in the passage we have quoted from *Astgen et al. v. Smith et al.*, *supra*.

37. Although we are not concerned here with any question of the “successorship” of one trade union to the bargaining rights of another, the Board’s jurisprudence with respect to trade union successorship forms an important backdrop against which the events in question here must be understood. A trade union may acquire the bargaining rights of another with respect to a particular bargaining unit of employees in one of three ways: it may displace the predecessor trade union by means of a timely certification application; it may be granted voluntary recognition by the employer following abandonment of the bargaining rights by the predecessor; or it may obtain a declaration under section 62 of the Act that it has acquired the rights, privileges and duties under the Act of the predecessor trade union.

38. The Board’s jurisprudence with respect to declarations under section 62 of the Act was reviewed at length in *L.M.L Foods Inc.*, [1985] OLRB Rep. Aug. 1252 at paragraphs 23 to 36. We do not propose to repeat that analysis here. The important point developed in that decision is that statutory bargaining rights are not a species of property which may be effectively conveyed or assigned by one trade union to another. Unlike the “successorship” provided for in section 63 of the Act, succession by one trade union to the statutory and collective agreement rights and obligations of another trade union does not occur automatically as a result of two trade unions’ having engaged in some particular form of transaction. Where resort is had to section 62 of the Act, it is the granting of the requested declaration by the Board which confers upon the successor the rights, privileges and duties under the Act of the predecessor. If there has been a “merger, amalgamation or transfer of jurisdiction”, the granting of such a declaration with respect to any particular bargaining unit is a matter of discretion, the exercise of which depends, having regard to the analysis in *L.M.L. Foods Inc.*, *supra*, on whether the employees in that bargaining unit have at some point signified their desire for or acceptance of the contemplated change in bargaining agent.

39. Although it is not an everyday occurrence, trade unions do from time to time enter into arrangements under which they consolidate their operations, anticipating that the functions of some or all of them will in future be performed by one of the participants or by an entity to be created. The collective bargaining consequences of such transactions may never become the subject of legal proceedings if the employees in the bargaining unit are supportive of representation by the intended successor and their employer does not question that support. Particularly where there is a non-contentious internal reorganization of trade union locals within a single parent trade union, employers are often prepared to take the word of the trade union officials with whom they have been dealing that, when it comes time for the collective agreement to be renewed, it would be appropriate to substitute the name of another local trade union for that of the incumbent bargaining agent. Technically, this amounts to the voluntary recognition of the substituted or successor trade union in circumstances in which there is an implied abandonment of bargaining rights by the former or predecessor bargaining agent. The interests of the affected bargaining unit employees are fully protected in those circumstances by section 60 of the *Labour Relations Act*. It is only when their employer refuses to recognize the proposed successor as the exclusive bargaining agent of employees in a particular bargaining unit that resort to section 62 (or to a “friendly” displacement certification application) becomes necessary with respect to that unit. If a trade union ceases to exist, then its bargaining rights cease to exist and its collective agreements cease to operate except to the extent that some other trade union can secure a declaration under section 62. When

trade unions engage in reorganization, however, they are prudent to keep each predecessor trade union in existence until its bargaining rights for each of the bargaining units it represents have come into the hands of the contemplated successor by means of certification, voluntary recognition or declaration under section 62.

40. From the perspective described in *Astgen et al. v. Smith et al.*, *supra*, Local 206 could not have ceased to exist unless with the unanimous approval of all of its members or in accordance with the provisions of the “constitution” by which those members were bound. That constitution consisted of both the bylaws of Local 206 and the constitution of the UFCW. The constitution of the UFCW clearly contemplates that a local will not cease to exist unless its charter is either surrendered or revoked. Article 31 deals explicitly with the matter of a local’s going out of existence. There is no evidence that the steps contemplated by that Article have been taken by or with respect to Local 206. It therefore remains in existence as an “organization”. It is still an organization, moreover, which was “formed for purposes that include the regulation of relations between employees and employers”, having regard to the provisions of the constitution and bylaws by which it is governed. There is no evidence that those provisions have been altered so as to change the purposes of the organization. At least some of its remaining members are employed, so it is an organization “of employees”. In other words, Local 206 satisfies all of the express requirements of the definition of “trade union” in clause 1(1)(p) of the Act. It is argued, nevertheless, that Local 206 has ceased to be a “trade union” within the meaning of that Act.

41. It is said that Local 206 cannot still be a trade union if it has no officers, which is said to be the case because having regard to a provision of the merger resolution purported to bring the terms of office of all officers of Local 206 to an end in November of 1986. Prior Board decisions have said that to be a “trade union” an organization must be “viable” and that viability requires that the organization have officers or agents acting on its behalf: see generally *The Public Utilities Commission of the Borough of Scarborough*, [1982] OLRB Rep. Apr. 609 at paragraphs 9 and following. The focus of the Board’s concern in that regard, particularly since the *CSAO* decision, has been simply on whether the organization has one or more officers or agents through which it has functioned or could function, rather than on whether all of the officers contemplated by the organization’s constitution have been filled in precisely the manner contemplated by that constitution. Here, Mr. Springall has been acting as the agent of the Local without there having been any challenge to his authority to do so. There is no evidence that any of the officers of Local 206 actually resigned their offices. It is not entirely clear, having regard to the constitution and bylaws which govern Local 206, how either the merger resolution itself or any action of the International under Article 8(J) could have removed those officers from office. Having regard to the language of Article 8(J), it is hard to see how such removal could be accomplished by “waiving” any of the provisions of Articles 34 and 35, which deal with the election and term of office of Local union officials. In any event, it is not apparent how removal from office of the officers of Local 206 was in any way “necessary to effectuate the merger”, which is a prerequisite to any waiver under Article 8(J) of any provision of Articles 39 and 35. Indeed, the continuation in office of an adequate contingent of officers was necessary to “effectuate the merger”. In any event, the parent union has officers. They have the power to impose trusteeship on Local 206, and thereby put in place an effective agent, in order to “assure the performance of collective bargaining agreements or other duties” of the Local in its capacity as a bargaining representative, pursuant to Article 9(H) of the UFCW constitution. Assuming that the Board can impose a “viability” test which goes beyond asking simply whether there is an “organization”, there can be no reasonable concern here that the organization is or is likely to be without agents through whom it can act. In all of the circumstances, any uncertainty in the status of Local 206’s officers is not a reason to conclude that it is not a “trade union” within the meaning of the *Labour Relations Act*.

42. It was also suggested that we should find Local 206 had ceased to exist as a trade union because it had failed to call or conduct meetings of its executive or membership, because it no longer had any assets and because the number of persons still holding membership in the Local was a small fraction of what the Local's total membership had once been. Nothing in the Act requires that an organization have a particular level of assets or number (greater than 2) of members or that it hold meetings of any particular kind with any particular frequency in order to be a "trade union". A supposed organization may be found not to be a trade union or to have ceased to be a trade union if it is unable to produce a copy of its constitution or otherwise show that there is a "complex of contracts" in place: *Footwear Fashions Limited*, [1981] OLRB Rep. April 454; *Center Tool & Mold Company Limited*, [1985] OLRB Rep. May 633. The recital of considerations in paragraph 3 of the Board's decision in *Allbright Platers Limited*, [1972] OLRB Rep. Aug. 784 is merely descriptive of the basis on which the Board there came to the conclusion that an organization had actually ceased to exist. It does not constitute an additional series of tests which must be met by an organization which continues in existence in order to continue to qualify as a trade union within the meaning of the Act. As the Board observed in *L.M.L. Foods Inc.*, *supra*, at paragraph 39:

The Board will not lightly come to the conclusion that an organization has ceased to exist. For the purpose of assessing a question of that kind, the Board looks to whether the vestiges of an organization remain and, particularly, whether the organization has officers of some kind continuing to act with apparent authority. *Dutch Laundry and Dry Cleaners Ltd.*, [1968] OLRB Rep. April 45.

A trade union may be inactive without becoming non-existent. On the evidence before us, Local 206 continued to exist as a "trade union" within the meaning of the *Labour Relations Act* when it made its request to the Minister that he appoint a conciliation officer.

43. Finally, there was the argument that when it made its request to the Minister, Local 206 was not the trade union the Board certified or thought it had certified in December 1987. This argument turned also on the changes in assets and numbers of members which Local 206 had undergone between the time it applied for certification and the time it applied to the Minister for an appointment of a conciliation officer. There is no suggestion that there is some other entity which is the same organization as was certified by the Labour Relations Board in December of 1987. The argument seems to be that to be and remain certified a trade union must not only continue to exist but must maintain the size and wealth it had when it applied for certification. The *Labour Relations Act* places no such limitation on the continuation of a trade union's bargaining rights. Indeed, the whole thrust of the Act is that the continuation of a trade union's bargaining rights for a bargaining unit is something which is ultimately determined by the employees in *that* bargaining unit. It would be inconsistent with that perspective that a trade union could lose bargaining rights for employees of one bargaining unit because it had lost (or, perhaps, gained) bargaining rights in a number of other bargaining units because of the wishes of the employees in those other units.

44. The fact that Local 206 intends ultimately to go out of the business of representing employees does not affect its current right to represent the employees in the subject bargaining unit. It has not abandoned its right to represent employees in that unit, nor has it abandoned its obligations in that regard. It has not gone out of existence as a trade union and it does not intend to go out of existence so long as it continues to have bargaining obligations.

45. In short, at the time it made its request to the Minister Local 206 continued to exist as a trade union with the bargaining rights which had been conferred on it by the Board in December of

1987 with respect to employees of Knob Hill Farms. Accordingly, we concluded that the Minister did have the authority to appoint a conciliation officer at its request.

DECISION OF BOARD MEMBER R. W. PIRRIE; February 9, 1989

1. I dissent from the majority decision.
 2. At the time of its certification on December 22, 1987, Local 206 had taken the decision, duly approved by its membership and the International UFCW, to merge itself into Local 175 with effect from November 1, 1986.
 3. A letter dated January 15, 1988 on Local 206 stationery over the signature of Mr. Springall notifying Knob Hill Farms of his wish to commence bargaining is the only action taken in the name of Local 206 vis-a-vis this bargaining unit. Every other action vis-a-vis Knob Hill, except for the "request for appointment of a conciliation officer" on August 25, 1988 which led to this proceeding, has been in the name of Local 175.
 4. Indeed this proceeding only occurred because Local 175 failed in its earlier attempt to have a conciliation officer appointed. In that first reference, Local 206 filed a reply which Mr. Springall signed setting itself out as the "predecessor" trade union. Further, in connection with this second reference Local 206 requested of the Board that it reconsider its decision in the December 22, 1987 certification application and substitute Local 175 in its stead.
 5. It is my view that the UFCW has conveniently breathed life back into Local 206; a life which since its merger into Local 175 two years ago, has not had as its purpose the regulation of relations between employees and employers.
 6. There was and still is a logical and correct step for the UFCW to take to rectify the dilemma in which it has placed itself. Local 175 should bring a section 62 application before the Board to have itself declared the successor union to Local 206 with respect to the Oshawa Knob Hill Farms bargaining unit.
 7. In my view, for the Board to sanction any other course of action which continues Local 206 in a role as bargaining agent for the Knob Hill Farm bargaining unit flies in the face of the UFCW's own intentions and actions and the realities of the UFCW/Knob Hill situation.
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1469-88-R International Union of Operating Engineers, Local 793, Applicant v. Kraft Construction Company (1978) Ltd., Respondent

Bargaining Unit - Certification - Construction Industry - Whether surveyors should be included in operating engineers bargaining unit - Board always describes ICI sector bargaining units in a manner consistent with the designation order - Operating engineers designation order including surveyors - Board jurisprudence indicating that the applicant has been granted differently worded certificates - Both surveyors and operators must be included in a bargaining unit applied for by the applicant - No clarity note required in that respect

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *Jack J. Slaughter*, *Ken Lew* and *Brian Madigan* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; February 21, 1989

1. This application came on for hearing on February 8, 1989 for the purpose of hearing the evidence and representations of the parties with respect to all matters arising out of and incidental to it.

2. No one appeared at the hearing on behalf of the respondent. Upon hearing and considering the representations of the applicant, the Board ruled (orally), pursuant to section 144(1) of the *Labour Relations Act*, that all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing or maintaining of same in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing or maintaining of same in the employ of the respondent in all other sectors of the construction industry in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining. The Board further ruled that all employees of the respondent engaged as surveyors are included in the bargaining unit, but that no clarity note was required in that respect.

3. The operation of businesses and the nature of employment in the construction industry are unlike those in other industries. They have resulted in the development of construction crafts or trades and a concomitant development of construction trade unions along craft or trade lines. In recognition of this, the *Labour Relations Act* and the Board approached construction applications for certification differently from non-construction applications.

4. While section 6(1) of the Act gives the Board a discretion in determining "the unit of employees that is appropriate for collective bargaining", that discretion is limited, in applications for certification in the construction industry, by sections 6(3) and 144 of the Act.

5. Section 144 covers all applications for certification in the construction industry (see *Clarence H. Graham Ltd.*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.*, [1983] OLRB Rep. March 407 and July 1104). Under the province-wide bargaining provisions of the Act, some trade unions are designated to represent certain specific trades or crafts in bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry. A trade union represented by a designated employee bargaining agency may, at its option, apply for certification under either section 144(1)

or (3), or enter into voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and which are therefore not covered by sections 144(1) through (4) of the Act, such as the Christian Labour Association of Canada, can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

6. The designation orders (which are issued pursuant to section 139(1)) describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of crafts or trades, and designate, for each such bargaining unit, an employer and an employee bargaining agency. In effect, such order designates the trade(s) or craft(s) which “belongs” to each employee bargaining agency and its affiliated bargaining agents. Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a craft or trade they have been designated to represent (see *Ninco Construction Ltd.*, *supra*; *Manacon Construction*, *supra*; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D.E. Witmer Plumbing and Heating Ltd.*, [1987] OLRB Rep. Oct. 1228). In fact, the structure of the Act requires an employee bargaining agency to represent all parts of the trade(s) or craft(s) it has been designated to represent in ICI bargaining. Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. To accommodate this designation system, and recognizing that trade union representation of the construction industry has historically been along trade or craft lines, the Board’s general practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade in using the words of the relevant designation order. Further, the Board has held that where a trade union seeks to be certified for a bargaining unit limited to a particular craft or trade (as an affiliated bargaining agent must do in an application which relates to the ICI sector of the construction industry), all employees pertaining to that trade or craft who are at work on the date of application must be included in the bargaining unit for certification purposes (see, for example, *Dufresne Piling Co.*, (1967) Ltd., [1984] OLRB Rep. July 924).

7. The applicant is an affiliated bargaining agent of a designated employee bargaining agency; namely, the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers. That employee bargaining agency is designated to represent in bargaining “all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors” represented by its various affiliated bargaining agents in the ICI sector of the construction industry in Ontario. Accordingly, employees engaged as surveyors have been deemed to have a community of interest with those who operate, or repair or maintain such equipment, and all are equally operating engineers.

8. Since the enactment of the province-wide bargaining scheme, including section 144, in 1978, the Board has granted the applicant herein three different kinds of certificates: (a) for employees engaged in survey work (“surveyors”) alone; (b) for employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same (“operators”) and surveyors; and (c) for operators alone.

9. In *Stone and Webster Canada Limited*, [1987] OLRB Rep. April 607, the Board found that:

15. From the evidence before the Board, it appeared that the International Union of Operating Engineers, Local 793 (“Local 793”) had applied to the Board to be certified as the bargaining

agent of employees engaged as surveyors for several construction companies. From a recital in a collective agreement between the Samia Construction Association and Local 793 which was admitted in evidence, it appeared that jurisdiction over non-professional survey crews had been transferred to the International Union of Operating Engineers in a letter dated January 25, 1965, from the American Federation of Technical Engineers. The earliest certificate in evidence before the Board was issued by the Board to Local 793 in 1968. The bargaining unit in that case was "all instrumentmen, rodmen and chainmen (in a geographic area) save and except party chief and those above the rank of party chief". Over the next ten years the Board issued twelve certificates to Local 793 with bargaining units defined in similar terms in various geographic areas in Ontario. Each of these applications for certification was entertained by the Board as an application for certification under the construction industry provisions of the *Labour Relations Act*. Since the advent of the legislative scheme of provincial bargaining in the industrial, commercial and institutional sector of the construction industry in 1978 the Board has issued a number of certificates to Local 793 with respect to bargaining units defined in terms of the standard bargaining unit description of operating engineers and employees engaged as surveyors or confined to employees engaged as surveyors with no reference to operating engineers. The most recent certificate which was referred to the Board was issued in 1982. The provincial collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency contains a schedule which covers and applies to employers engaged in survey work within the Province of Ontario. The schedule refers to the classifications of instrumentman, senior and junior rodman, chainman and party chief. The schedule also sets out the scope of their duties and responsibilities. Local 793 has entered into sixteen collective agreements which cover "employees engaged as surveyors, in all sectors of the construction industry in the Province of Ontario and engaged in any such work outside of the construction industry in the said Province."

16. From the evidence before the Board it is clear that Local 793 has a history of acquiring bargaining rights for employees engaged as surveyors and of entering into collective agreements with respect to such employees. Moreover, the acquisition and exercise of these bargaining rights has occurred within the construction industry across the Province of Ontario. The Labourers' International Union's history in acquiring and exercising bargaining rights for employees engaged as surveyors is limited to Local 183, confined to the area around Metropolitan Toronto and is limited to survey companies that do not operate as employers in the construction industry. The bargaining history of Local 793 with respect to employees engaged as surveyors is of a far greater extent and is far more pertinent to the construction industry than is any comparable history within the Labourers' International Union. This bargaining history appears to have been recognized by the Minister of Labour when on March 31, 1978, she designated Local 793 and the International Union of Operating Engineers as the employee bargaining agency to represent employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario pursuant to section 139(1) of the *Labour Relations Act*.

17. The terms "surveying" and "surveyors" cover a range of activities. Surveying may be regarded as the process of measuring and delineating the contours, dimensions and positions of any part of the earth's surface and the relationship of one point relative to any other point. Surveying on the earth's surface involves the intricacies of geodetic surveying down to the simple surveys performed by municipalities and on construction sites. On construction sites the complexity and permanence of the job will dictate whether the surveying will require co-ordinates and the construction of a grid on a plan or simply the determination and sketching of lines, curves and angles during the initial aspects of construction. The term surveyors likewise embraces a range of abilities and training. Not all surveyors are covered by the *Labour Relations Act* and section 1(3)(a) specifically states that, subject to section 90, for the purposes of the *Labour Relations Act*, no person shall be deemed to be an employee who is a member of the land surveying profession entitled to practise in Ontario and employed in a professional capacity. Ontario land surveyors are covered by this exclusion. The employees who are affected by this application are not members of the land surveying profession. These employees are non-professional surveyors as that term is commonly understood in the construction industry. The interpretation given to "surveying" and "surveyors" also varies on construction sites even among construction trades unions. This is particularly true with respect to layout work which is sometimes considered to be outside the term "surveyors". For example, in *Commonwealth Construction Company Limited* (Board File No. 1630-76-R, decision dated January 11, 1977), the

Board in determining an appropriate bargaining unit of surveyors on an application by Local 793, excluded from the bargaining unit, by a clarity note, "a person who uses any instrument or tool for layout work incidental to the trade of carpentry". In that case the employer was bound by a collective agreement which included a specific reservation of such work for carpenters. Moreover, the definitions of "rodman, chainman or stakeman" and "grader" referred to in paragraph 12 indicate that they do not use instruments notwithstanding their titles.

18. The evidence established that there are differences in skill and ability among the classifications of rodman, levelman and instrumentman. It is readily apparent that a rodman may be adequately trained on the job in a matter of days. In the case of a levelman and an instrumentman, the necessary skill and ability is produced by post-secondary instruction and training with on-the-job experience. There was evidence that on this project construction labourers could and did become rodmen. There was no similar evidence with respect to construction labourers who became levelmen and instrumentmen. The applicant may well number among its membership individuals who are competent levelmen or instrumentmen. However, there was no evidence that on this project any of the levelmen or instrumentmen were construction labourers. The course on pipelaying and concrete offered by the International offered an opportunity for construction labourers to understand the uses of surveying and no doubt takes some of the mystery out of the process. It appears to the Board that the part of the course dealing with surveying enables construction labourers with ability and ambition to become levelmen and then instrumentmen. Having regard to the unchallenged evidence before the Board, such a course does not produce competent levelmen or instrumentmen. On the evidence before the Board, there was no one on the list of employees who was a construction labourer who had engaged in survey work. There was reference to a Ken Cameron who had worked as a construction labourer and who had had his classification changed to rodman. However, Mr. Cameron's name did not appear on the list of employees who would fall within the bargaining unit and accompanying clarity note proposed by the applicant. Having regard to the provisions of section 6(1), this application is dismissed.

19. The Board also examines the effect of the provisions of the *Labour Relations Act* on this application for certification. This application is an application for certification under section 144(1) of the *Labour Relations Act*. Section 144(1) of the Act provides:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency.

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

Such an application may be brought by either an employee bargaining agency or one or more affiliated bargaining agents of an affiliated bargaining agency on behalf of all affiliated bargaining agents of the employee bargaining agency. The unit of employees is required to include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area. It was agreed that the applicant is an affiliated bargaining agent. The evidence before the Board does not establish that the applicant is a bargaining agent that, according to established trade union practice in the construction industry, represents employees engaged in survey work who commonly bargain separately and apart from other employees within the meaning of section 137(1) of the *Labour Relations Act*.

20. In *Clarence G. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, the Board held that section 144 of the *Labour Relations Act* deals with all possible applications for certification in the construction industry. Since this application refers to the industrial, commercial

and institutional sector of the construction industry, it may only be made pursuant to section 144(1). In *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407, the Board considered the requirements of section 144(1) and stated in paragraphs 34 and 35 at pages 423-424 as follows:

34. Section 144(1) also sets certain requirements for the bargaining unit that will be appropriate. It stipulates that:

“...the unit of employees *shall include all employees who would be bound by a provincial agreement* together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.”.

[emphasis added]

35. A provincial agreement is, by definition, a collective agreement which, amongst other things, contains provisions respecting “...the rights, privileges or duties of...the affiliated bargaining agents represented by the employee bargaining agency...” and provisions respecting “...terms or conditions of employment of...the employees represented by the affiliated bargaining agents and employed in the [ICI] sector...”. Thus a provincial agreement deals with the bargaining rights held by affiliated bargaining agents represented by their employee bargaining agency. In turn, the first requirement of the definition of “affiliated bargaining agent” in section 137(1)(a), as noted at paragraph 30, is that it be a bargaining agent that “...according to established trade union practice in the construction industry, bargains separately and apart from other employees...”. From reading those two definitions together, and in the context of the requirement of section 144(1) that “...the unit of employees shall include all employees who would be bound by a provincial agreement...”, it may be seen that those employees represented by the trade union making application under subsection 1 “...who commonly bargain separately and apart from other employees...” are the ones who would be covered by a provincial agreement.

10. The applicant is an affiliated bargaining agent of an employee bargaining agency which has been designated to represent both operators and surveyors in bargaining in the ICI sector of the construction industry, and, as *Stone and Webster Canada Limited*, *supra*, observed, both operators and surveyors are covered by the same provincial collective agreement, and are therefore in the same bargaining unit. In short, in the construction industry, surveying has been deemed, for purposes of applications for certification under the *Labour Relations Act*, to be part of the operating engineer craft or trade.

11. In recent years, the Board has attempted to streamline its approach to construction industry applications for certification. For example, it has focused on the date of application in determining the number of employees in a bargaining unit for certification purposes (see, for example, *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976; *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364 and July 645). The Board has attempted to create as certain, equitable, and expeditious means as possible for disposing of applications for certification.

12. In all of the circumstances, it seems to make little sense to bifurcate the employees who are covered by the same provincial agreement and which an employee bargaining agency and its affiliated bargaining agents have been designated to represent for certification purposes. In the case of the applicant, not only does it create situations in which a bargaining unit may be described in terms which are not (entirely) consistent with the relevant designation order (see paragraph 6 above), it also creates uncertainty with respect to how the Board might describe a bargaining unit

and, concomitantly, what employees would be included in it for certification purposes. In our view, both surveyors and operators must be included in a bargaining unit applied for by the applicant for certification purposes. The bargaining unit description should also reflect this. Consequently, the applicant's standard bargaining unit for certification purposes should mirror the designation order and should include operators (as defined in paragraph 8 above) and surveyors, whether or not there are present, or contemplated, employees in all the classifications mentioned in the bargaining unit description (by analogy see *D. E. Witmer Plumbing and Heating Limited, supra*, at para 9).

13. In the result, we find it appropriate, pursuant to our powers under section 106(1) of the Act, to vary our oral ruling as aforesaid by including the reference to employees engaged as surveyors in it. Consequently, the Board finds, pursuant to section 144(1) of the Act, that all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in repairing or maintaining of same, and employees engaged as surveyors, in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors, in the employ of the respondent in all other sectors of the construction industry in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The list of employees filed by the respondent contains five names on Schedule A. The applicant challenges the inclusion of the three (John Buchanan, Paul Merrifield, and Ken Sundell) identified as being "equipment operators". It agrees that these individuals were equipment operators on the date of application but asserts that they were not employees of the respondent.

15. In the circumstances, the Board finds it appropriate to authorize a Labour Relations Officer, to be designated by the Registrar, to inquire into and report to the Board with respect to whether John Buchanan, Paul Merrifield and Ken Sundell (or any of them) were employees of the respondent on the date of application. In the circumstances, namely that this phase of the project is expected to end in about one month, the Labour Relations Officer is directed to perform a check of the employer's records for that purpose and report to the Board with respect thereto before proceeding with any examinations. The parties will be given an opportunity to make submissions with respect to the Officer's report to the Board in that respect.

2064-86-U; 2065-86-R; 3097-86-U International Union of Operating Engineers, Local 796, Complainant v. **Metropolitan Life Insurance Company**, Respondent; International Union of Operating Engineers, Local 796, Applicant v. Metropolitan Life Insurance Company, Respondent #1 v. Allen Maintenance Ltd., Respondent #2; International Union of Operating Engineers, Local 796, Complainant v. Allen Maintenance Limited, Respondent

Duty to Bargain in Good Faith - Employer - Related Employer - Unfair Labour Practice - Life insurance company contracting out cleaning services - No common control or direction between the company and the cleaning contractor - Related employer application dismissed - Argument that life insurance company was the true employer of the workers performing the cleaning work dismissed - Complaint that cleaning contractor and life insurance company conspired to get rid of the unionized cleaners dismissed - Complaint against life insurance company that it was motivated by anti-union considerations dismissed - Complaint that company failed to disclose during collective bargaining its decision to contract out the cleaning services dismissed

BEFORE: *Nimal V. Dissanayake*, Vice-Chair, and Board Members *R. J. Gallivan* and *P. V. Grasso*.

APPEARANCES: *Peter Waldman* and *Celine Castonguay* for the complainant; *D. Churchill-Smith*, *J. A. Roffey* and *D. Gibson* for Metropolitan Life Insurance Company; *E. Supino* and *N. Allen Prupas* for Allen Maintenance Ltd.

DECISION OF NIMAL V. DISSANAYAKE, VICE-CHAIR AND R. J. GALLIVAN, BOARD MEMBER; February 9, 1989

1. File 2064-86-U and 3097-86-U are unfair labour practice complaints against Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan") and Allen Maintenance Ltd. (hereinafter referred to as "Allen") respectively. File 2065-86-R is an application under section 1(4) of the Act. These proceedings result from the contracting out in October 1986 by Metropolitan of cleaning services at 99 Bank Street in Ottawa. Shortly thereafter, the International Union of Operating Engineers, Local 796, ("the union") which held bargaining rights for some of the affected Metropolitan employees, filed the unfair labour practice complaint herein against Metropolitan (2064-86-U) and the application under section 1(4) herein (2065-86-R) together with an application under section 63 of the Act (2066-86-R). All three matters came before a previous panel of the Board ("previous panel") in January 1987.

2. Over the objections of counsel for the union, the previous panel had ruled that it would not consolidate the three files and that each application will be heard separately. Accordingly the section 63 application was heard first. The previous panel convened again in February, 1987 at which time on its own motion the Board decided to consolidate the two remaining matters, namely the unfair labour practice complaint and the section 1(4) application. In the meantime, after that hearing had commenced, the union filed the complaint herein against Allen (3097-86-U) and requested that it be also consolidated with the ongoing proceedings. The Board declined to do so, and File 3097-86-U was set aside in abeyance.

3. On March 10, 1987, the previous panel issued its decision in File 2066-86-R dismissing the application under section 63. In the meantime the hearings in Files 2064-86-U and 2065-86-R had been substantially completed. Unfortunately the Vice-Chair of the previous panel fell ill. When it became apparent that the Vice-Chair in question would not be able to resume the hearing,

the Registrar listed those two files, together with file no. 3097-86-U, before the present panel for *de novo* hearing.

4. At the outset of the hearing the Board was called upon to make a number of rulings in view of the unusual circumstances of this case. We do not propose to set out all of these. However, we do note the submission made by counsel for Metropolitan, that since at the end of the hearing in File 2066-86-R before the previous panel, the parties had agreed that the evidence in that hearing will be applicable to the other two files, this panel should determine the matters before it solely on the basis of the evidence set out in the previous panel's decision in File 2066-86-R. Counsel for the union not only opposed this, but made a motion that this Board "vacate" the decision of the previous panel in File 2066-86-R. Counsel pointed to many alleged "irregularities", including the fact that the union was required to proceed first. For reasons orally delivered, the Board denied the union's motion to "vacate". While the Board was prepared to admit the evidence set out in the previous panel's decision, we ruled that the parties were free to adduce any evidence before us and that we would make our own findings of fact based on all of the evidence before us.

5. With that background, we turn to the matters before us. Metropolitan is a well known company in the field of life and health insurance and annuities. It has had its head office in Ottawa, Ontario, at least since 1924. In 1976 it acquired land and erected an office tower at 99 Bank Street, consisting of some fifteen floors. Since 1976, Metropolitan's offices have been housed at 99 Bank. However, its offices occupied only about 60 per cent of the building. The rest was leased to various tenants.

6. Since the early 1960's, Metropolitan has had a collective bargaining relationship with the union. At the relevant time a collective agreement was in place, covering a variety of Metropolitan's full-time employees including cleaning staff. Metropolitan had full-time and part-time cleaning staff, who cleaned not only the areas occupied by Metropolitan, but also those occupied by its tenants. In this manner, Metropolitan fulfilled its obligation to its tenants under the leases to provide cleaning services. Only the full-time cleaners were covered by the collective agreement.

7. Metropolitan has a Real Estate Division and a Property Management Branch within its organization and these sections are responsible for Metropolitan's real estate assets and investments. In November, 1984, Metropolitan acquired another premises at 50 O'Connor as an investment property. This building, located adjacent to the 99 Bank building, was leased out to tenants. Prior to doing so, Metropolitan put tenders out for the cleaning of 50 O'Connor. Following a bidding process, Allen was awarded a contract for cleaning 50 O'Connor.

8. In early 1986, Mr. Gordon Harrison, Metropolitan's Director of Property Management undertook a review of the cleaning of 99 Bank, and issued a report, which in essence recommended that the cleaning of 99 Bank be contracted out. In Harrison's assessment this would represent a 50 per cent saving for Metropolitan. In June 1986, Harrison's recommendation was approved by Metropolitan's Management Committee subject to legal advice. After a legal opinion was obtained, Allen was invited to submit a quotation for the cleaning of 99 Bank street and on September 22, 1986 a contract was executed.

9. The evidence indicates that this contracting out of cleaning services to Allen resulted in the termination of employment of some 48 part-time cleaners (not represented by the union) and some ten full-time cleaners (represented by the union). Essentially, Allen took over the work performed by the night cleaners, the bulk of whom were part-time and hence not unionized.

10. Allen has been active in the office cleaning business since 1967. Its operations are mainly in the cities of Montreal, Ottawa and Toronto. At the time of the hearing, it had some 200

office cleaning contracts. Metropolitan was one of its many “customers”, and represented less than five per cent of its total work. Allen has never had any corporate relationship with Metropolitan (i.e. no common shareholders, directors, managers etc.) and has never represented itself as having any such relationship.

11. The union contends that under section 1(4) Metropolitan and Allen are to be treated as one employer for the purposes of the Act. Alternatively it is submitted that the employees used by Allen to perform the cleaning at 99 Bank are, in law, employees of Metropolitan. In addressing the section 1(4) application the Board must examine the activities engaged in by Metropolitan and Allen, and if it is satisfied that the conditions precedent to the application of section 1(4) have been met, the Board must decide whether it will exercise its discretion to make a declaration. Section 1(4) of the Act provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

12. Until October 1986, Metropolitan engaged its own employees in cleaning 99 Bank and at that time Allen took over the same activity. Since Metropolitan and Allen, two separate corporations, carried on the same activity (albeit not simultaneously) the conditions set out in section 1(4) would be satisfied if the union can persuade the Board that such activity was carried out under common control or direction.

13. As noted, Allen is owned and operated completely independently of Metropolitan, and there is no connection between the management or employees of the two corporations. Since there is no institutional relationship, any common control or direction must be found in the contractual arrangement entered into for cleaning of 99 Bank and the day to day implementation of that contract.

14. The Board has recognized that section 1(4) may in certain circumstances apply to sub-contracting arrangements and further that in certain situations the purchaser of the service, and not the sub-contractor, may be found to be the true employer of the employees performing the work. In *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293, the Board observed at 1298-99:

“The Board has previously accepted the proposition that sub-contracting relationships can under certain circumstances bring two nominally independent firms within the ambit of section 1(4). As was stated in the *Charming Hostess* case [1982] OLRB Rep. April 582, the more closely a firm which has contracted out work controls when, where, how, by whom and at what place the work is to be done, the more the activities of the two firms will appear to be under joint control or direction. Indeed, the degree of control may be so great as to lead to the conclusion that the firm allegedly contracting-out certain work is in fact the true employer of the individuals performing it, and that they are not employees of the ‘sub-contractor’ at all. See: *K Mart Canada Limited*, [1983] OLRB Rep. May 649. In addition, a section 1(4) declaration may be appropriate in instances where a sub-contractor is effectively dominated by the firm letting out the work, and it appears the true purpose of the sub-contract was not to provide the dominant firm with independent managerial or employee skills, but rather to provide it with a separate ‘non-union’ corporate vehicle with which it could continue performing the same work as before but outside of any collective bargaining obligations. See *J.H. Normick Inc.* [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited* [1980] OLRB Rep. Apr. 436.”

15. In *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50 at 53-54, the Board discussed the effect of section 1(4) on a sub-contracting arrangement:

"In *Kennedy Lodge*, the Board introduced the terms 'core' and 'peripheral' functions, in commenting upon the question of community perception. ... Without seeking to define any further the terms 'core' and 'peripheral', we would simply observe that the contracting out of the kind of work involved here, in terms of food services and housekeeping services, would not seem to offend the sensibilities of the labour relations community in the way that the purported contracting-out of direct nursing care does. And indeed the history of companies like Versa Services in providing these services within the health care industry of the province makes it difficult for anyone to argue 'surprise' over a development like the present. In any event, as the Board noted at the end of its comments with respect to community perception in *Kennedy Lodge*, the question before the Board and arising under the Act remains one of intent, and of 'control', and we find nothing in the evidence before us to suggest anything but a *bona fide* intent to hand the responsibility for these severable aspects of the Home over to the business organization of Versa Services. Whether these are areas, as they obviously are, which are integral to the continued operation of a nursing home, and with respect to which a strike could obviously cause disruption, and whether as a result the employees engaged in these on-site activities fall under the *Hospital Labour Disputes Arbitration Act*, as they obviously do, does not assist the Board in assessing on a case by case basis the degree of responsibility given up in a particular 'subcontracting' arrangement, and that remains the issue for the Board under section 1(4) of our Act."

16. It is clear that Metropolitan prepared the specifications which were included in the cleaning contract. This contract spells out Metropolitan's cleaning requirements, outlines in considerable detail the various cleaning functions which must be performed, and the frequency with which such tasks should be performed. The evidence is that there was hardly any "negotiations" involved and that Allen agreed to the specifications that were required by Metropolitan.

17. The contract price was arrived at by Allen in its bid, by estimating its costs for wages and supplies and adding to it a profit mark-up. The contract contains an escalation clause, whereby additional wage costs resulting from an increase in the statutory minimum wage rate is passed on to Metropolitan.

18. Allen hired approximately 25 employees to service the 99 Bank contract, after running a newspaper advertisement and interviews conducted by its management at its own offices. During work hours at 99 Bank, Allen employs a Quality Control Manager and other supervisory personnel. These individuals have no connection with Metropolitan or its management. It is Allen's management that determines the employee complement, work schedule and job assignment. The supplies and tools required for the work are provided by Allen. Metropolitan is not involved in the hiring, supervision, disciplining, or termination of Allen employees, nor is Metropolitan involved in an ongoing monitoring function as to the employees' work performance.

19. However, this is not to say that Metropolitan is totally disinterested in the way Allen employees go about their tasks and in the end product. It would have been surprising if they were so disinterested because, as the landlord, it had a responsibility towards its tenants to provide adequate cleaning services. If there was inappropriate conduct or incompetent work performance by an Allen employee, the affected tenant would naturally look, not to Allen with whom the tenant has no connection, but to its landlord, Metropolitan. It is logical to expect that Metropolitan would in these circumstances pass on any tenant's complaint to Allen and insist that Allen abide by its contractual obligations. If the allegation is substantial and amounts to a non-compliance with the terms of the cleaning contract, Allen would be expected to take immediate corrective action.

20. The evidence indicates that when Metropolitan did the cleaning of 99 Bank through its own employees, it maintained a log book where complaints about the cleaning were entered by Metropolitan's tenant co-ordinator. When the cleaning supervisor arrived each night, he or she

inspected the log book and took whatever action required with respect to complaints. When Allen took over the cleaning of 99 Bank, the log book concept was continued. Mr. E. Supino, a principal of Allen, testified that the log book is a tool commonly used in the office cleaning industry where the cleaning is done at night and the customer's work hours do not overlap with that of the sub-contractor's.

21. Counsel for the union submits that common control or direction is established by the terms of the cleaning contract itself. Particular reliance is placed on the detailed specifications of the cleaning functions and clause 7(b) of the contract which provides:

Any person employed on the work who is disorderly, incompetent or unacceptable to the Owner for security reasons shall be removed immediately when required by the Owner and no such person shall be re-employed on any part of the work without the consent of the Owner.

Counsel further relies on *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931 and contends that Metropolitan has contracted out a core part of its business of being a landlord and urges us to find that it continued to exercise control over that activity following the contracting out. Alternatively it is contended that the true employer of the employees performing the work under the cleaning contract is Metropolitan.

22. Despite the able submissions of counsel for the union, we are of the view that common control or direction has not been established. The Board does not see the detailed cleaning contract as indicative of control or direction as would satisfy section 1(4). These specifications ultimately go to describing the end product expected by Metropolitan for the price paid. It is not an exercise of *ongoing* control and direction. In *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. Nov. 1585, in dismissing a similar section 1(4) application with respect to a sub-contracting arrangement for office cleaning, the Board was also faced with a similar detailed cleaning contract. The Board, at page 1595 made the following observation:

Because there is considerable competition for the services which Federated supplies, O&Y may have considerable leverage, but this is no more than a customer would normally have in a favourable market and is not the kind of control which, in itself, would warrant a "related employer" declaration under section 1(4) of the Act. Nor do we think that much turns on the specificity of the cleaning contract. Detailed contracts of this kind are quite common in the industry, are necessary, given the size of complexity of O&Y's building, and in any event, are not analytically different from the kind of detailed contracts found in other sectors of the economy (in the construction industry, for example). A degree of functional interdependence is inevitable, and implicit in many subcontracting arrangements. What is significant here is the absence of any other *indicia* of relatedness, or the mischief which section 1(4) was designed to prevent.

23. Similarly, clause 7(b) of the contract is not evidence of control or direction by Metropolitan of Allen employees. The evidence is clear that the right to hire, supervise and fire these employees is exercised by management of Allen. Clause 7(b) is a recognition that Allen will provide employees who can provide a service that meets the standards set out in the contract and that Allen will not employ employees who are disorderly. This is not surprising because it must be remembered that the work is performed on Metropolitan's premises. This provision is meant to deal with extreme circumstances and there is no evidence that Metropolitan has exercised it since the contract became effective in 1986. In *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923, the contract for garbage collection entered into by the City contained the following clause:

13. DISCIPLINE OF EMPLOYEES

Should any overseer, mechanic, driver or workman employed on or about the work or in connection therewith, give any just cause for complaint (of which the Engineer shall be the sole

judge), the Engineer shall notify the contractor in writing, stating the reasons therefore, and the contractor shall discipline such person forthwith to the satisfaction of the Engineer and he shall not again be employed by the contractor on any City work without the consent in writing of the Engineers.

That did not cause the Board to find that the city had common control or direction.

24. The log book, in our view, is nothing more than a practical necessity as a tool of communication. The ultimate benefactors of Allen's cleaning services, i.e. individuals in Metropolitan's offices and in the various tenants' offices, are at work during the day. If they find any problem, it must be communicated to Allen, who only appears at night to perform the work. The system set up is a sensible and logical one. The tenant who has a complaint informs the tenant co-ordinator employed by Metropolitan, who in turn communicates the complaint to Allen through the means of an entry in the log book. The evidence is that the tenant co-ordinator merely passed on the information. She did not monitor the situation to ensure that corrective action is taken. She became involved again only if a further complaint is received. It is further the evidence that if corrective action was not forthcoming despite repeated complaints and entries in the log, the avenue open to Metropolitan was to contact Allen's principal's to demand compliance with the contractual terms. It is also noteworthy that Allen did not blindly act upon receiving a complaint. Its supervisors first ensured that the complaint is substantiated and that it has resulted in a non-compliance with Allen's obligations under the contractual terms.

25. In *Federated Building Maintenance (supra)* also, there was evidence of the purchaser relaying tenants' complaints to the sub-contractor and demanding corrective action. However, the Board concluded that section 1(4) was not properly applicable.

26. It is not necessary here to decide whether cleaning was a core or peripheral part of Metropolitan's activity of being a landlord. As the Board in *Caressant Care Nursing Home (supra)* did, (see the reasoning reproduced at paragraph 15 above) we observe that it is not uncommon for a landlord of a large office building to contract out its cleaning services. It cannot be said that such action "will surprise the labour relations community or offend its sensibilities".

27. On the basis of the total evidence before us, we are satisfied that Allen assumed full control and direction of the cleaning services when it took over the 99 Bank contract. Allen pre-existed this contract by nearly 20 years, as a contractor providing specialized office cleaning services. Metropolitan represented only about 5 per cent of Allen's total business. Allen had its own principals, management and employees. It offered its specialized service to anyone who was willing to meet its terms, and Metropolitan was one of its many customers. Apart from the contractual rights it had, Metropolitan had no connection with Allen institutionally or in terms of controlling and directing the day-to-day affairs of Allen with respect to 99 Bank.

28. In *Federated Maintenance (supra)* at page 1594 the Board stated:

33. Section 1(4) permits the institutional rights of a trade union and the contractual rights of its members to attach to a definable commercial activity regardless of the particular legal vehicles through which that activity is carried on. Legal form or changes in form will not necessarily dictate, fragment, or undermine a collective bargaining structure. Two firms - quite separate in law - can be treated as one employer for collective bargaining purposes, and the union need not pursue the often difficult question of who would be "the real employer" applying common law tests. Moreover, if a particular commercial relationship falls within the ambit of the language of section 1(4) and the facts establish the mischief which section 1(4) was designed to avoid, it does not avail respondents to claim that they are separate companies with merely a "subcontracting" relationship. There is no magic in terminology. *On the other hand, while many subcontracting arrangements might arguably fall within a literal reading of the language of section 1(4), we do not*

think the statute was ever intended to collapse the vast majority of bona fide subcontracting relationships. Section 1(4) is clearly discretionary, and should be applied only where there is clear evidence of the mischief it was intended to avoid.

[emphasis added]

In all of the circumstances, the mischief addressed in section 1(4) is not present here.

29. The Board also cannot accept the contention that Metropolitan is the true employer of the employees performing the cleaning at 99 Bank. In *York Condominium Corporation*, [1977] OLRB Rep. Oct. 642 at 645, the Board set out a list of factors relevant to the issue of who is the employer:

- “(1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC 16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. 32, 325; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. 753, 761.
- (2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. 487, 488; the *Beer Precast Concrete Limited* case, *supra*; the *Kel Truck Services Ltd.* case, 1972 CLLC 16,068; and the *Templet Services* case, [1974] OLRB Rep. 606, 608.
- (3) The party imposing the discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party who is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.”

30. In *The City of Stratford (supra)*, the Board characterized the issue as “who exercises fundamental control over the working lives and working environment of the employees”. On the evidence, we cannot reasonably conclude that it is Metropolitan that exercises such control. While Metropolitan does have some general control and direction over the work performed by the Allen cleaners through its contractual rights, that is not sufficient to make it the employees’ employer. Nor does that constitute “common control or direction” within the meaning of section 1(4). In *Caressant Care Nursing Home (supra)* at 51, the Board stated:

“There is no doubt that all of the services provided by Versa Services or any contractor to the licensee of the Home would have to be carried out under the ‘general direction’ of the licensee, and the contractor remains ‘responsible’ to the licensee, as Exhibit 3 stipulates, for it is the licensee itself who at all times remains ultimately responsible for the maintenance of adequate care in the Home. But the specific options reserved to Caressant Care under this arrangement we find to be no more than a customer could normally expect to have access to, either expressly or as a matter of commercial reality, in ensuring that the performance of the contractor continues at all times to meet its general specifications and requirements. We recognize that there is in any business relationship, apart from perhaps fixed-term contracts, the right of termination of

the arrangement by the customer which, as a practical matter, requires a contractor to be more or less responsive to, any complaints by its customers. *The question is whether, on an on-going basis, the contractor really has taken over control and responsibility for the selection, training and supervision of the employee workforce, and is truly independent in making the decisions that it does.*"

[Emphasis added]

31. Despite the contractual obligations and the working arrangements it had with Metropolitan, we are convinced that Allen took over on an on-going basis, the control and responsibility for the selection, training and day-to-day supervision of the employees and that in making the decisions that it does, it is truly independent.

32. We turn next to the complaint against Allen. The allegation is that Allen conspired with and/or aided Metropolitan in getting rid of the latter's unionized cleaners. Apart from making this bold assertion, the only concrete evidence relied on by the union is the fact that Allen did not give any special priority to the displaced Metropolitan employees when it hired its workforce to service the 99 Bank contract. The evidence is absolutely clear that Allen had no input into or knowledge of, Metropolitan's decision to contract out the cleaning at 99 Bank. The quality of its service was known to Metropolitan from its work at 50 O'Connor. On the basis of that reputation Allen was invited to submit a bid for 99 Bank. It did, and its bid was accepted. The evidence of both of Allen's principals is uncontradicted that, while Allen was aware at the time of the bidding that Metropolitan had its own employees cleaning 99 Bank, it had no knowledge of whether they were full-time or part-time or what wages were paid to them. Specifically, they were unaware right up to the time of receiving notice of these proceedings that the Metropolitan Cleaners were unionized.

33. Mr. Supino candidly admitted that the experience of the Metropolitan employees and their knowledge of the building would have made them attractive candidates for employment by Allen. However, it was Allen's policy not to enter into a cleaning contract with conditions attached about hiring the customer's former employees. Allen insisted on doing its own hiring based on its own criteria. Allen followed its usual policy when it advertised the cleaning positions in the media. Any person, including former Metropolitan employees, were free to apply. Indeed the evidence is that two or three Metropolitan employees (it was not clear whether they were full-time bargaining unit employees) did make inquiry, but were not willing to meet Allen's productivity standards and/or accept the wages being offered. This is not surprising because Allen's wages were substantially lower than what employees of Metropolitan earned under the collective agreement. Also, Allen was proposing to perform the cleaning at 99 Bank with a workforce which was almost half the size of the employee complement utilized by Metropolitan. There is no reason to doubt Mr. Supino's evidence that Allen would have been more than happy to employ former Metropolitan employees if they were willing to meet the higher productivity standards set by Allen and to accept the substantially lower wages. There was a conspicuous absence of evidence of any Metropolitan employee agreeing to those terms being refused employment by Allen.

34. In these circumstances the Board cannot make an inference of unlawful motive on the part of Allen, by its failure to make a special job offer to Metropolitan's former employees. On the contrary, the evidence indicates that Allen dealt with the situation in accordance with its usual practice. Therefore the complaint against Allen has not been established.

35. The complaint against Metropolitan is two-fold. First, it is contended that the contracting-out was motivated, in whole or in part, by anti-union considerations. Secondly, it is alleged that Metropolitan was guilty of bad faith bargaining by failing to disclose during collective bargaining its decision to contract out cleaning services at 99 Bank.

36. The evidence is that Metropolitan had entered into a cleaning contract with Allen with respect to 50 O'Connor. Through that, Metropolitan got to know the quality of service provided by Allen and the cost. In 1986 it undertook a review of its cleaning at 99 Bank and decided to contract out that also to Allen. Before doing so, Metropolitan obtained a legal opinion from legal counsel experienced in labour relations matters.

37. Despite the valiant efforts of union counsel to convince us to the contrary, we are satisfied that what occurred here is a bona fide contract out of cleaning work to a pre-existing contractor, who was a specialist in the field. In reaching this conclusion, we have been influenced by the fact that the majority of the employees affected by the decision were part-timers, who were not unionized. In other words, the bulk of the work contracted out was cleaning work performed by part-time night cleaners. The contracting out did not result in the ousting of the collective agreement or the union. Indeed, the evidence is that the bargaining unit is still in place consisting of some 12 employees in different job classifications other than cleaning, and that the collective agreement had been renewed since the filing of the present applications. The only adverse result from the union's point of view was the termination of ten cleaners who were members of the bargaining unit. While the loss of employment of bargaining unit members is a serious matter under any circumstances, in the particular facts before us we cannot conclude that anti-union considerations played any part in Metropolitan's decision to contract out.

38. We are also of the view that there has been no contravention of the duty to bargain in good faith. Counsel claims that the failure to disclose during collective bargaining of the contracting out of cleaning services amounts to bad faith bargaining. Whether or not the collective agreement's scope clause captured 50 O'Connor, there is no evidence that the union has ever asserted any bargaining rights with respect to 50 O'Connor. From the time 50 O'Connor was acquired, Metropolitan operated it as being non-union. The two buildings are situated adjacent to each other. And yet the union did not exercise diligence to assert its bargaining rights. In these circumstances there has been no breach of section 15 with respect to 50 O'Connor.

39. While 50 O'Connor was contracted out in 1984, Mr. Harrison's evidence is that he reviewed the cleaning situation at 99 Bank in 1986, i.e. after the bargaining had been completed. His recommendation was approved and a decision to contract out taken only in June 1986. At most, the evidence indicates that Metropolitan decided to experiment with contracting out cleaning services at 50 O'Connor, with an idea that if the experiment is successful, consideration will be given to contracting out cleaning at 55 Bank also. The evidence is that during collective bargaining the union made no inquiry about contracting out. Indeed the topic of contracting out was never raised. On the basis of the evidence, we cannot infer that at the time of the negotiations, a de facto decision had been made to contract out 99 Bank. That decision was taken only in 1986 following the report prepared by Mr. Harrison. At best, Metropolitan, was in a wait-and-see mode with respect to the desirability of contracting out. This is not a situation which triggers a duty to disclose on Metropolitan.

40. In *BCL Canada Inc.*, [1984] OLRB Rep. June 791 at 793, the Board made these comments about the duty to disclose a planned contracting out:

16. Based on the evidence before us we consider that the most probable conclusion to be drawn is that after mid-May, 1983, when the ECCO Packaging proposal was rejected, contracting out ceased to be regarded as a likely avenue to be actively pursued by the respondent. We accept the evidence of the respondent that while the collective agreement was being negotiated in 1983 there was no decision, firm or otherwise, to contract out and that there was a decision made to realize savings by reducing the amount of material which had to be used in sheeting. As a consequence, we can see no basis for the application of the reasoning in *Westinghouse Canada Limited* [1980] OLRB Rep. April 577 or *Consolidated Bathurst Packaging Ltd.* [1983] OLRB

Rep. Sept. 1411 to give rise to any obligation to make an unsolicited disclosure about contracting out.

17. We can see no basis in the evidence for drawing any inference that the respondent had made a *de facto* decision to contract out while negotiating for the 1983/84 collective agreement. There is ample evidence to the effect that the respondent viewed the sheeting operation as a necessary evil which it required to reduce the cost of its production waste. It seems to have been an open secret that it would get out of its sheeting operation if it could be presented an attractive viable alternative. That seems to have been the extent of the respondent's planning. It did nothing to invite proposals after May, 1983, and all of its actions after that date were aimed at improving its production of film so that the sheeting operation would get less material. This is exactly the sort of planning situation that both the decisions in *Westinghouse, supra*, and *Consolidated Bathurst, supra* regarded as being beyond the scope of any duty to volunteer information.

41. The Board is of the view that with respect to 99 Bank, Metropolitan had not reached any *de facto* decision at the time of negotiations and that in that situation there was no duty to make unsolicited disclosure.

42. For the reasons set out above, the Board is not persuaded that any basis for relief has been made out and accordingly these complaints and application are hereby dismissed.

DECISION OF BOARD MEMBER P. V. GRASSO; February 9, 1989

1. I dissent, in part, from the majority decision.

2. I am satisfied, on the facts in this case, that a section 1(4) has been met. Section 1(4) of the Act reads:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. While Allen Maintenance seems to exercise fairly free discretion over staffing, the cleaning agreement gives Metropolitan Life the ability to exercise a degree of managerial authority respecting staff, it has also reserved to itself considerable managerial authority over the day-to-day operation. Some of this control has not been exercised because the arrangements appear, at present, to be operating on an agreeable basis. Should any disagreement arise Metropolitan Life has reserved to itself the ability to step in and assume direction in respect to key areas of management. Allen Maintenance retains responsibility in hiring and directing of employees subject, however, to their obligation under the contract. For an example under Appendix "E", page 2 of 5, paragraph 3 of the cleaning contract, it states:

3. All persons employed as Daytime staff are to have authority to carry out directions given to them by the Director or Buildings Manager whether or not this involves minor changes to the specification.

Director or Buildings Manager, as above noted, refers to Metropolitan Life Personnel and not Allen Maintenance. In addition, Metropolitan Life has total discretion to decide whether or not a completed cleaning operation is acceptable to them.

4. In *Hansuk, operating as Wendy's Bake-off*, (1987) Alberta Labour Relations Board Rep. July 188, the Board noted that:

This was an application by the union for declaration that the operator of the bakery department in a retail store was a common employer with the store. The retail store changed its system for making baked goods so that the process would be run by persons under contract to Wendy's Bake-off, a subcontractor, rather than by employees of the retail store. The former employees either transferred to bakeries in other stores or were laid off. The employer argued, *inter alia*, that the operator and the retail store were not engaged in associated or related activities.

5. The Alberta Labour Relations Board held that *Wendy's Bake-off* was bounded by the existing collective agreement and at page 189 said:

The Board found that the arrangement was an attempt to maintain basically the same end product using lower paid non-union employees in place of the higher paid union employees in the store's bargaining unit. The degree of integration, the lack of any demonstrable independent aspect to the bakery's operation and the continued high level of retail store involvement in the bakery's operation distinguished this from straight case of subcontracting to an independent operator.

6. For the reasons set out above, I find that Allen Maintenance Limited and Metropolitan Life Insurance Company are common employers pursuant to section 1(4) of the Act for the purposes of collective bargaining, as a result I would make a declaration under section 1(4) that Allen Maintenance Limited is bound by the collective agreement currently in force between Metropolitan Life Insurance Company and the International Union of Operating Engineers, Local 796.

2241-86-R The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. **Ontario Hydro**, Respondent v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener v. The Coalition to Stop the Certification of the Society on behalf of certain employees, Tom Stevens, C. A. Stevenson, and Michelle Morrissey-O'Ryan and George Orr on behalf of certain objecting employees, Objectors

Certification - Trade Union Status - Employer recognizing the applicant as the representative body for a group of employees for a number of years - Whether the applicant is a trade union - Whether employer support so as to prohibit Board from certifying applicant - Board rejecting proposition that an organization which includes managerial persons in its membership cannot be a trade union - Not critical that an applicant establish a technically satisfactory constitutional continuum if it has been in existence a long time - Board discussing ways a trade union may be brought into existence - Applicant found to be a trade union - Certification of applicant not prohibited by s.13

BEFORE: Owen V. Gray, Vice-Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

APPEARANCES: James K. A. Hayes and others for the applicant; F. G. Hamilton and others for the respondent; A. M. Robinson and others for the employee objectors represented by the Coalition to Stop the Certification of the Society; no one for the other objectors; no one for the intervener.

DECISION OF THE BOARD; February 22, 1989

1. For a number of years, The Society of Ontario Hydro Professional and Administrative Employees ("the Society") has "represented" administrative, scientific and professional engineering employees of Ontario Hydro ("Hydro") in their dealings with their employer, under the terms of a series of written agreements in which Hydro "recognized" the Society as the "representative body" for a defined group of such employees. Hydro treated its relationship with the Society as a "voluntary" one falling outside the scope of the *Labour Relations Act* ("the Act"), a characterization which the Society had not challenged for 15 years when, in November 1986, it filed this application under the Act for certification as exclusive bargaining agent for the roughly 6600 employees it then "represented" in its existing relationship with Ontario Hydro (hereafter referred to as "Society represented employees"). This decision deals with two issues: whether the applicant is a "trade union" within the meaning of clause 1(1)(p) of the Act and, if it is, whether section 13 of the Act prevents its certification. For convenience, and despite some possible semantic inaccuracy, these two issues will be referred to in this decision, as they were at hearing, as the "status questions".

2. A number of issues are raised in and by this application, not the least of which (at least in terms of the time and effort which might be required to resolve it) is whether, as Hydro claims, roughly 3100 of the roughly 6600 persons "represented" by the Society at the time the application was filed exercised managerial functions within the meaning of subparagraph 1(3)(b) of the Act in connection with the employment either of other persons represented by the Society or of persons in the bargaining units for which Canadian Union of Public Employees - C.L.C. Ontario Hydro Employee Union Local 1000 ("OHEU") and other trade unions hold bargaining rights. Persons to whom subparagraph 1(3)(b) of the Act applies would not be included in any bargaining unit for which the applicant could be certified under the Act. Hydro's position on that issue is supported by The Coalition To Stop Certification of the Society ("the Coalition"), whose role in these proceedings as representative of objecting employees was described in paragraph 3 of our decision of February 25, 1988 ([1988] OLRB Rep. Feb. 187). It is said that the presence of "managerial" employees in the applicant's membership is said to be relevant to the status questions.

3. Our decision of February 25, 1988 dealt with the claim, first raised by the Coalition, that certain Society represented employees fall within federal jurisdiction for labour relations purposes. In that decision we concluded that some of Hydro's facilities fall within the ambit of the declaration in section 17 of the *Atomic Energy Control Act*, so that Hydro's relations with those it employs on or in connection with any such facilities (the nuclear reactors in its nuclear generating stations, for example) fall under federal jurisdiction for labour relations purposes. Those persons would not be included in any bargaining unit for which the Society might be certified. The Board has not yet determined with particularity which of the positions occupied by Society represented employees fall within federal jurisdiction, but it is reasonably clear that a substantial number of such persons, including a number of those identified by Hydro as "managerial", would be excluded for that reason.

4. There are other issues which affect both the composition of the appropriate bargaining unit or units for the purpose of this application and the list of persons who fell within the unit or units on the application date. One issue is whether professional engineers should form a separate unit or be included in a unit with other employees. Consideration of their wishes in that regard in accordance with subsection 6(4) of the Act will require identification of those Hydro employees who fall within the Act's definition of "professional engineer", something Hydro has indicated may be difficult in a number of instances, even without the complications introduced by the constitutional limitation on our jurisdiction. Another issue concerns professional land surveyors, whose inclusion in any unit would depend on the Society's establishing, as it seeks to do, that no effect can be given to subsection 1(3)(a) of the Act because it contravenes the Canadian Charter of

Rights and Freedoms. Another issue is whether, as the Coalition claims, the Research Division (to the extent it falls within provincial jurisdiction for labour relations purposes) should be excluded from any unit containing other Hydro employees on a community of interest basis.

5. In addition to issues which affect the composition of the appropriate unit or units and the list of employees employed therein on the date of the application, there is the question whether the membership evidence filed by the applicant is a satisfactory basis, quantitatively and qualitatively, for a decision either to direct a representation vote or to certify without a vote under subsection 7(2) of the Act. In that connection, issues have been raised about the form of some of the membership evidence and about the circumstances in which membership evidence was obtained. There are also issues raised which go to the question whether the Board should direct a representation vote even if it finds that there is satisfactory evidence that over 55% of the employees in an appropriate unit on the application date were members of the applicant at the time determined under clause 103(2)(j) of the Act.

6. None of the other outstanding issues in this application has to be decided unless the Society establishes that it is a trade union, a proposition which Hydro and the Coalition dispute, nor need those other issues be decided if, as Hydro and the Coalition assert in the alternative, the Society is disqualified from certification because it is a trade union to which section 13 applied by reason of its having received employer support. We initially determined that those two “status questions” should be addressed in evidence and argument before dealing with any of the others (decision dated June 25, 1987, unreported). We subsequently determined (for reasons set out in our decision of September 21, 1987, unreported) that we would deal first with the constitutional issue which had in the meantime been raised in material exchanged by the parties in connection with the status questions. (See generally [1988] OLRB Rep. Feb. 187 at paragraphs 2-7.) That issue was addressed in our decision of February 25, 1988 ([1988] OLRB Rep. Feb. 187). This decision now addresses the two status questions.

Background

7. On June 28, 1947, this Board found “Hydro Electric Power Commission Unit No. 1 Federation of Employee-Professional Engineers and Assistants” (“Unit 1”) to be a trade union with majority support in a bargaining unit consisting of “all persons engaged in the practice of engineering as that term is defined in *The Professional Engineers Act*, R.S.O. 1937, Chapter 237, who are in the employ of The Hydro-Electric Power Commission of Ontario [now Ontario Hydro] and who come within the definition of employee in the Regulations”. Acting under the then applicable legislation, it certified two individual designees of the trade union as bargaining representatives for all employees in that unit. By virtue of the provisions of subsequent legislation, Unit 1 itself became the exclusive bargaining agent for all employees in that bargaining unit.

8. It appears Hydro and Unit 1 made their first collective agreement in June 1948. In December of that year, regulations made under the *Labour Relations Act, 1948* amended the previous definition of “employee” to exclude “a member of the ... engineering ... profession qualified to practise under the laws of Ontario and employed in that capacity.” Nevertheless, Hydro and Unit 1 continued to make collective agreements covering employees in the unit for which Unit 1 had been certified. Indeed, in 1955 the recognition clause was expanded so as to include “professional scientists” and “graduate-engineers-in-training” in the unit for which Hydro recognized Unit 1 union as “sole representative.” At some point in the early 1950s, Unit 1 came to be known as “The Ontario Hydro Unit, Canadian Federation of Engineers and Scientists” (“The Ontario Hydro Unit”). In late 1956, the parent body, the Canadian Federation of Engineers and Scientists, decided to dissolve. Those in attendance at a membership meeting of The Ontario Hydro Unit

called and held for that purpose in November 1956 purported to adopt a new constitution along with a new name: "Society of Ontario Hydro Professional Engineers". Hydro treated the newly named organization as the bargaining agent under the collective agreement then in force between it and The Ontario Hydro Unit.

9. In 1958, Hydro refused to enter into any further formal agreement with the Society of Ontario Hydro Professional Engineers ("SOHPE"). This created considerable consternation among members of SOHPE, who pressed for continued formal collective bargaining. In 1961, Hydro and SOHPE entered into the following "Letter of Understanding":

LETTER OF UNDERSTANDING BETWEEN
THE MANAGEMENT OF ONTARIO HYDRO
and
THE SOCIETY OF ONTARIO HYDRO
PROFESSIONAL ENGINEERS

1. Management recognizes the Society as the representative body for all professional engineers and scientists of Ontario Hydro from MP1 to MP6 inclusive who are members of the Society except those employed in a confidential capacity.
2. The mechanism by which Management and the Society meet to effect agreement is confirmed; viz. matters of mutual interest are to be referred to the Joint Society-Management Committee, to which each body appoints an equal number of representatives. The Committee may agree to discuss any item of interest to either party, and to introduce or re-open items for discussion at any time.
3. Committee agreements are to be recorded in writing, and when such agreements have received mutual approval of Management and the Society, they shall become working conditions.
4. The Society accepts as a guide to conditions of employment at this time those items in the Management Guide and those Directives so far made known to the Society as they apply to professional engineers and scientists.
5. It is the intent of Management and the Society to devise a mutually acceptable grievance procedure as soon as possible, similar to procedures now being followed. However, final stage in such procedure shall provide compulsory arbitration by a third party.
6. It is the desire and intent of Management and the Society to co-operate in the early development of a system for settling any and all points of disagreement between them. It is mutually recognized that for optimum effectiveness such a system must in general ensure for Society members treatment comparable with that enjoyed by the members of certified bargaining agents recognized by the Commission.
7. Pending the development of the system referred to in Item 6, Management undertakes not to alter working conditions of Society members without prior consultation in the Joint Society-Management Committee or with the Executive of the Society.

Hydro and SOHPE went on to establish a redress procedure, as contemplated by paragraph 5, and written agreements on terms and conditions of employment, as contemplated by paragraphs 2 and 3. The relationship under this "master" agreement continued for roughly ten years. During that time, SOHPE amended its constitution to add the words "and Associates" to its name and to provide for two classes of members. "Regular" members were those whom The Society of Ontario Hydro Professional Engineers and Associates ("SOHPEA") could represent in negotiations under the existing arrangement with Hydro. "Associate" members were those outside the scope of such representation. Associate members had the same rights as Regular members, "other than repre-

sentation and voting on matters of negotiations with Ontario Hydro". Member engineers who rose beyond the MP6 classification into positions on the Executive Salary Roll ("ESR") positions (which positions were indisputably "managerial" from a labour relations perspective and for which SOHPEA never had or sought the right to bargain collectively), tended to remain as Associate members if only to continue their participation in group insurance plans which SOHPEA had arranged.

10. In February 1971, the *Labour Relations Act* was amended to delete "engineering" from the list of professions whose members were deemed not to be employees by subsection 1(3)(a) and to add provisions now found in clause 1(1)(n) and subsection 6(4) of the Act. When its negotiations with Hydro reached an impasse later that year, SOHPEA applied to the Minister under what is now subsection 16(3) of the Act for appointment of a conciliation officer. Hydro disputed the Minister's authority to do so, and the Minister referred the question of his authority to the Board for its advice under what is now section 107 of the Act. Following what we have been told was a one-day hearing, a panel of the Board concluded that the Minister did not have that authority because SOHPEA was not a trade union, for reasons which appear in the following passage from its decision of August 23, 1971 ([1971] OLRB Rep. Aug. 501):

5. The applicant submitted that as a result of the [1961] Letter of Understanding it was recognized as a trade union and entitled to the benefit of section 13(3). Hydro resisted the application on the basis inter alia:

- 1) that the applicant was not at any time a trade union;
- 2) that there was not a collective agreement in effect between the applicant and the employer;
- 3) that the applicant did not represent or was not entitled to represent persons in the unit for which this application is made.

While a number of submissions were made concerning the retrospective effect of The Labour Relations Act and the nature of the purported bargaining unit we are of the opinion that the first objection raised by Hydro respecting this application is valid, and we do not propose to deal with the remaining submissions.

6. In order to avail itself of section 13(3) the applicant must show that it is a trade union. Section 13(3) presumes that there is an agreement between an employer and a trade union. A trade union is defined in section 1(1)(j) as "an organization of employees". The status of the applicant as a trade union was challenged on the basis that the applicant included in its membership a number of persons who were managerial and could not qualify as "an organization of employees". Mr. Val Scott the General Manager of the applicant for the past twelve years testified about the membership of the applicant. We were impressed with the candid and forthright manner in which he gave his evidence. He indicated that there are at least sixty-five persons in the organization who are considered to be managerial and are members of management and that there are also other members who perform managerial functions. He further testified that these people are dues paying members of the organization who associate with the organization in support of its interests as professional engineers. He attempted to clarify the applicant's position by indicating that the managerial members do not have a part to play with respect to bargaining for wages or working conditions. During re-examination by the applicant's counsel Mr. Scott candidly stated that as a result of the membership of these managerial people there did exist "a potential for conflict of interest". Again, he indicated that this had not been a problem.

7. This Board over the years has refused to give status to purported trade unions on the basis that members of management are or have been involved in its organization. There are many cases on that point. The whole spirit of The Labour Relations Act is to provide trade unions with a separate and distinct identity from management in order to maintain their integrity in dealing with management. See e.g. section 10, section 13(b) and section 48. Indeed, section 48 makes it an unfair labour practice for management to involve itself in certain trade union affairs.

The spirit of the legislation and the cases before this Board which have invoked that spirit resulted because of the potential for a conflict of interest with respect to certain issues in collective bargaining. That is not to say that co-operative and harmonious relations do not exist between employers and trade unions. But it does consider that on occasion there will be issues where relationships must be maintained at arms length. To this end the legislature has required that trade unions be free from any type of management involvement. The "potential for conflict of interest" which Mr. Scott admits exists in his organization is precisely the problem that the legislation has attempted to resolve by requiring that trade unions be separated from management. We pause to note that even the original certificate obtained in 1947 was restricted to professional engineers who were "employees". On the basis of the evidence before us we have no alternative but to find that the applicant is not an organization of employees but is an organization of both employees and persons exercising managerial functions and accordingly it does not come within the definition of a trade union contained in the Act.

8. Our decision does not mean that bona fide bargaining has not taken place between the parties with respect to wages and working conditions or that bona fide bargaining could not take place in the future. Our concern is with the "potential for conflict". We also recognize that the parties may voluntarily agree to bargain collectively for managerial persons and while certain other legislation has recognized that managerial persons are appropriate for collective bargaining there is no such legislation in this Province and this Board does not have the jurisdiction to go beyond the terms of the legislation as it presently exists.

9. During argument counsel for the applicant suggested that the definition of bargaining units for professional engineers and the managerial exclusions may require a different approach from the one the Board has exercised in the past because of the professional nature of engineers, and the nature and type of work that they perform. Be that as it may, it does not in any way derogate from Mr. Scott's evidence in this case. We wish to further indicate that this decision is based on the particular circumstances and is not to be taken as indicating the considerations that this Board will give in defining bargaining units composed of professional engineers. Suffice it to say that this Board has dealt with persons engaged in a professional capacity such as nurses, and the thrust of cases defining bargaining units has been such that the Board has considered the particular facts and the nature of the existing relationships, and has attempted to define the bargaining units and their exclusions in a realistic sense considering the complexity of modern problems facing employers and employees. In an appropriate case the Board will consider the particular problems that arise because of the nature and type of work performed by professional engineers and the relationships that arise because of that work. But that is not the issue in this case.

10. In the result we are of the opinion that the applicant is not a trade union and accordingly section 13(3) is not applicable to the relationship between the parties, and we respectfully advise the Minister that in our view he has no authority under The Labour Relations Act to appoint a conciliation officer.

There is a dispute between Hydro and the Society about whether the managerial members about whom the panel was concerned were just its ESR level Associate members or included also Regular members who Hydro apparently argued were also not "employees" by virtue of subsection 1(3)(b) of the Act. Even if it were possible for us to do so, it is unnecessary to resolve that dispute.

11. Following the 1971 decision, SOHPEA went back to the bargaining table with Hydro, seeking a new "voluntary" agreement. It also considered certification and canvassed its members' views on pursuing that option. Material circulated by the Society at the time speaks of the number of members who would be "in the group" as a result of certification being less than the number it had been representing under the 1961 agreement and its successors. It is unnecessary for us to determine whether this betrays awareness that members other than Associate members fell within the ambit of subsection 1(3)(b) of the Act or just a belief that a certified bargaining unit would be limited to professional engineers. In the result, SOHPEA entered into a new agreement with Ontario Hydro covering the group it had represented at the time of the Board's 1971 decision, and did not then pursue the certification option.

12. The new master agreement took effect January 1, 1973. Its provisions included these:

- (1) Ontario Hydro recognizes the Society as the representative body for all professional engineers and scientists of Ontario Hydro in MP1 to MP6, FMP 11 to FMP 16 and Engineering Trainees who are members of the Society except those employed in a confidential capacity.

...

- (3) Negotiations between Ontario Hydro and the Society shall take place through a Joint Society-Management Committee to which each body will appoint an equal number of representatives. Negotiations shall be conducted in good faith and both parties shall make every reasonable effort to reach agreement on matters of mutual interest as expeditiously as possible.

This master agreement went on to provide that the parties' agreements were to be in writing. If agreement could not be reached on salary schedule adjustments, that matter was to be referred to an arbitrator whose award would be binding. Other matters on which the parties could not agree were to be referred to mediation by a mediator selected by the parties. If the mediator was unable to effect a settlement, he was to recommend a settlement which the parties were obliged to seriously consider but not to adopt. Hydro retained "the right to make the final decision" on those non-salary matters. This master agreement also incorporated by reference the redress procedure Hydro and SOHPE had worked out in 1963, under which a member's complaint about "unfair treatment" could be referred by either Hydro or the Society to third party arbitration if not first successfully resolved in its multi-step grievance procedure.

13. Hydro's MP and FMP classifications did not apply only to engineers and scientists; others also fell within those classifications. The Society's constitution was amended later in 1973 to extend eligibility for membership to all employees on these salary scales. Many newly eligible employees did join as Associate members. They wished SOHPEA to represent them in dealings with Hydro. In response to SOHPEA's request for expanded recognition as representative for all employees in the MP and FMP classifications, SOHPEA and Hydro arranged to have the firm of Clarkson Gordon & Co. conduct secret ballot votes among the affected employees. The group to be added were polled separately from those already represented. In January 1976, both groups voted in favour of expanded representation. In June 1976, Hydro signed a new master agreement with SOHPEA which provided, among other things, that

- (1) Ontario Hydro recognizes the Society as the representative body for MP1 to MP6 inclusive, FMP11 to FMP16 inclusive and staff on Salary Schedules 04 and 18, excluding those employed in a confidential capacity in matters relating to negotiations with respect to the Society or employees engaged in full-time security work, as contained in an agreed listing.

This clause has no limiting effect on any recognition clause that has been established under the Ontario Labour Relations Act.

This was the first master agreement in which the Society was recognized as "representative body" for employees without regard to whether they were members of the Society. The reference to "any recognition clause that has been established under the Ontario Labour Relations Act" was intended to make it clear that the group represented by the Society did not include any employee who fell within OHEU's bargaining unit.

14. OHEU represents a very large unit (over 16,000 in 1988) of clerical and technical employees in collective bargaining with Hydro, in a relationship which was established with a pre-

decessor employee association by voluntary recognition. None of the participants or witnesses identified the date recognition was granted; it appears it must have been in the 1940s, after collective bargaining became the subject of legislation in Ontario. Since the early 1950s, at least, it was understood that persons deemed not to be employees by the *Labour Relations Act* were excluded from the unit. During the 1960s, OHEU challenged Hydro's historic exclusion of a number of positions from contract coverage, including M & P positions. These challenges took the form of applications to this Board under what is now subsection 106(2) of the Act. Hydro witnesses told us that the number of such applications and their consequent burden on the resources of the Board led its then Chairman to suggest to the parties that they establish their own criteria and process for resolution of such disputes. The parties agreed on the process: arbitration. They could not agree, however, on the criteria by which an arbitrator was to identify "managerial" or "confidential" positions. The elaboration of such criteria was one of the issues dealt with by the interest arbitration board which settled a collective agreement pursuant to legislation which brought OHEU's 1972 strike to an end. The exclusionary criteria imposed by that interest arbitration board were essentially those proposed to that board by Hydro.

15. Substantially the same criteria have since appeared in each of OHEU's subsequent collective agreements with Hydro. "All professional engineers employed in a professional capacity including employees who are not professional engineers but are engaged in the same job classification" are excluded. Positions which are rated in a particular way under a job evaluation scheme established by Ontario Hydro in June of 1968 are excluded. "... [N]onunion [sic] jobs as of September 24, 1972, shall retain their existing jurisdictional status" unless and until "an arbitrator rules that the factors which originally substantiated exclusion are no longer operative", in which case the position may then be tested against the general criteria. Under the headings "managerial functions" and "confidential matters", the agreement lists a number of sorts of job requirements or characteristics. The presence in it of any one of these factors is sufficient to make a job eligible for exclusion. The exclusionary criteria in the OHEU/Hydro agreements do not expressly distinguish between positions in which the performance of one or more of the listed functions is a substantial part of the overall duties and responsibilities of the position and positions in which that is not so.

16. Effective June 1976, SOHPEA amended its then constitution to preclude Associate members from holding executive office. In late 1976, SOHPEA changed its name to "The Society of Ontario Hydro Management and Professional Staff" ("SOHMPS"). The parties debate the significance of the Society's adoption of this name to describe itself. The phrase "Management and Professional Staff" had been applied by Ontario Hydro since 1959 to those in the MP job classifications, including those in positions which had fallen within the bargaining unit represented by Unit 1, The Ontario Hydro Unit and SOHPE between 1947 and 1958. Hydro's then General Manager had explained the new phrase and concept in a memorandum distributed in 1959. Its adoption was there said to have been prompted, in part, from "[l]ack of clear recognition of those categories of staff as being the backbone of the management function" and to reflect the proposition that Hydro "regards all its professional employees, and all its supervisory employees in positions evaluated in Plan A, hereafter to be known as Management and Professional staff, as performing functions which are part of, or are in support of, the overall management of the Commission's business". At that time, the leadership of SOHPE saw the initiative of which the new classification label was a part as an attempt by Hydro to dissuade those they represented from continued support for any form of collective bargaining. Subsequent history shows the attempt was not entirely successful.

17. In any event, Hydro called the job classifications of persons represented by SOHPE and SOHPEA "Management and Professional". When it had expanded its membership base beyond professional engineers and scientists, SOHPEA adopted the name of the job classifications as a

means of describing itself. As it had all along, it had in mind the possibility that it might apply for certification in the future. There was a concern at the time that the reference in its name to “management” might adversely affect such an application. In material it circulated to its members before they approved the name change, SOHPEA noted that

We have obtained legal advice on this matter and counsel advises that the Ontario Labour Relations Board is not concerned in any way with the name of an organization and has no jurisdiction in this regard. Rather, the Board examines specific job functions and decision-making powers of individuals to determine the appropriateness of the composition of the group. In fact, were that most unfortunate situation to arise where relations with Management had deteriorated to such an extent that a majority of our members would want to seek certification, the problem of composition of the group would be considerable, since many of our more highly-placed members would probably have to be excluded from membership. Measured against this, concern with having the term “Management” in our name pales in significance.

Above all, however, we see positive reasons for including the term. In the narrow sense (Ontario Labour Relations Board criteria), very few of our members are “Management.” In the broader sense, however, a great many members are clearly what is generally called middle management. The Society *in fact* represents professionals *and* middle-management people. To leave out the term “Management” (or some comparable term) would, in our view, fail to give sufficient recognition to the non-professional component of the membership, thereby defeating the purpose of changing the name of the Society.

It is true, of course, that the Board does not treat the name of an organization as determinative of its “status” under the Act, any more than it treats the name of a job classification as determinative of its incumbent’s status under the Act. We reproduce this passage because it is illustrative of two of the recurring themes in this stage of the proceedings: Hydro’s assertion that the Society or its predecessors knew that its membership included persons to whom subsection 1(3)(b) of the Act would apply, and the Society’s assertion that it believed that the so-called “middle-management” employees it represented were generally not “managerial” from this Board’s perspective.

18. In 1981, following requests by a number of them that they be allowed to join, SOHMPS amended its constitution to permit employees in Hydro’s OSS (Office Supervisory Services) and TS (Trades Supervisory) job classifications to become members. A representation vote was conducted among employees in those classifications in 1983. Results tabulated by Clarkson, Gordon showed that a majority in each classification favoured representation by SOHMPE. Thereafter, SOHMPE and Hydro entered into a written agreement recognizing the Society as “the representative body” for those in OSS and TS classifications. That agreement formed an addendum to the new master agreement covering MP and FMP staff which Hydro and the Society entered into at about the same time. There was a transitional period during which certain provisions of the new master agreement, including the provision for determination of salary adjustments by arbitration, were not applicable to OSS and TS staff. In late 1984, the new master agreement was amended to include the OSS and TS staffs in the recognition article and apply to them all of the then provisions of that master agreement. As had the recognition clauses in both the new 1983 agreement and the OSS/TS addendum, the recognition clause in the amended master agreement expressly excluded “those persons primarily employed in a confidential capacity and making effective recommendations affecting the terms and conditions of employment for Society-represented staff or employees engaged in full-time security work” and retained the caveat, introduced in the 1976 master agreement, that “[t]his article has no limiting effect on any recognition clause that has been established under the Ontario Labour Relations Act.”

19. The new master agreement of 1983 came about as a result of negotiations which followed Hydro’s election in April of that year to give notice of termination of the master agreement then in effect. That notice of termination shook the faith of the Society’s executive in the viability

of the "voluntary relationship". The conclusion of a new master agreement did not entirely restore their faith in the viability of a relationship "outside the Labour Relations Act." Against the possibility that the new master agreement might not prove to be a satisfactory basis for a continued "voluntary relationship", steps were taken to amend the SOHMPs constitution for the express purpose of better positioning the organization for a certification application. Proposed amendments included a change of the organization's to its present one, a change to the language of the objects of the organization to expressly empower the Society to serve as "the collective bargaining agent" for member employees with Hydro and changes to its membership provisions to eliminate the Associate Member category and expressly exclude from eligibility for membership

those employees who are exercising managerial functions, or employed in a confidential capacity to such a degree that the Society and Ontario Hydro have agreed to exclude such employees from Society representation, in addition to any employee that the Ontario Labour Relations Board may deem to be excluded from the protection of the Ontario Labour Relations Act.

These amendments were made by membership referendum, with effect as of November 1983, in accordance with the provisions of the constitution by which the organization's affairs were then understood to be governed.

20. During the early 1980s, Hydro had been discouraging those on its Executive Salary Roll from maintaining Associate membership in the Society. In 1982, Hydro stopped honouring the requests of ESR Associate Members that their dues in the Society be paid by payroll deduction. Those few on the Executive Salary Roll who remained Associate Members when the constitution of the Society was amended in 1983 so as to make them ineligible for membership were advised by the Society that their membership was terminated.

21. Difficulties with the new 1983 master agreement did arise, including a quite serious dispute over whether the arbitrability of complaints about certain actions by Hydro was a matter which could be determined by an arbitrator under the redress procedure provided for under the master agreement. The Executive of the Society considered how best to ensure that its relationship with Hydro would be governed by the *Labour Relations Act*. One of the options they considered was to simply initiate or precipitate proceedings to test the assertion that the Act already governed the existing relationship and that the existing master agreement and the subsidiary agreements made under it constituted a "collective agreement" to which the Act's arbitration and other provisions already applied. This came to be described as the "back door" route. The Society's executive rejected that approach. They preferred to establish the applicability of the *Labour Relations Act* by means of a certification application based on membership evidence obtained expressly for that purpose, so that the result would be founded on a direct demonstration of express majority support for representation by the Society in collective bargaining under the *Labour Relations Act*.

22. In 1985, the Society conducted a referendum to determine its members' wishes with respect to the certification option. A majority of those who cast ballots favoured pursuit of that option. In January 1986, the Society began collecting membership evidence for the purpose of this application. Its efforts in that regard are referred to in what follows as its "card signing campaign" or "organizing campaign".

The Organizing Campaign

23. The membership evidence collected by the Society took two forms. One is a "certificate of membership". Each such certificate bears a confirmation by the employee and by the Secretary-Treasurer of the Society that the employee in question is a fees-paying member of the Society. The confirmation which existing members were invited to sign reads as follows:

I hereby confirm that I am a member of The Society of Ontario Hydro Professional and Administrative Employees and have paid the Society fees as indicated herein. I confirm that I authorize the Society to represent me as my bargaining agent in all matters concerning the terms and conditions of my employment. I hereby confirm that I am bound by the Society's constitution.

A substantial majority of the approximately 3200 membership documents filed in connection with this application are in this form.

24. Employees who were "represented" by but not then members of the Society were invited to sign an application for membership in the following form:

I hereby apply for membership in the Society of Ontario Hydro Professional and Administrative Employees and agree to conform to and be bound by its Constitution. I confirm that I have authorized the Society to represent me as my bargaining agent in all matters concerning the terms and conditions of my employment.

I agree to pay the annual fee in accordance with Article XII of the Constitution (annual fees set at \$156.00 on April 1, 1983) and hereby acknowledge that I have paid \$5.00 towards the first month's fee of \$13.00. I understand such fees may be changed only in accordance with the Constitution.

There is provision on this form for confirmation by the collector of receipt of the sum of Five Dollars. Hydro and the Coalition introduced into evidence another form of application for membership in the Society which did not include the second sentence of the form which we have quoted, nor the reference to payment of \$5.00 toward the first month's fee. The Society's uncontradicted evidence is that this was an earlier form of membership application which was in use before it began its card-signing campaign but was not used during the campaign or otherwise for the purposes of this application.

25. There can be no doubt that the phrase "Society's constitution" in the certificates of membership and the applications for membership meant and would have been understood to mean the constitution which was understood to have come into effect in November 1983 following the amendments referred to in paragraph 19 of this decision.

26. Over the years, the Society has acquired a number of rights or privileges with respect to the use of Hydro facilities. The Society has three telephone lines directly connected to Ontario Hydro's internal telephone system. It has direct and unlimited access to Ontario Hydro's internal mail system, by means of which written material may be sent to and received from Hydro employees anywhere in the province. It is given the use of certain bulletin boards or portions of bulletin boards in Hydro facilities throughout the province, on which it can post notices of its activities. As a result of discussions and negotiations over the years, Hydro permits members of the Society's Executive and delegates to take time off, without loss of salary or benefits, to attend to Society activities. Hydro premises, including its auditorium and meeting rooms, are made available for Society activities without restriction as to frequency or purpose of use. In recent years, on an almost annual basis, the Society has requested and been provided with information in various forms, including mailing labels, setting out the names and work locations of those who fall within the classifications for which the Society is "recognized" by Ontario Hydro as the "representative body", so that the Society could contact those represented persons who had not yet joined the Society (membership in the Society being voluntary) and invite them to join. Those who do join or have joined the Society sign written authorizations directing Hydro to deduct from their salary and remit to the Society the amount of their membership dues. Except as we have noted in paragraph 20, Hydro has routinely honoured these requests over the years. Other than for the telephone lines and for the expenses involved in providing it with the lists of represented staff, the Society does not make any payment to Hydro for the use of these rights and privileges.

27. The Society continued to use these rights and privileges during and in connection with its efforts to collect evidence of employee support for use in this application for certification. Although the Hydro mail system was not used in connection with the referendum or for transmission of membership evidence, it was used on a regular basis to communicate Society news and information, including news about the progress of its card-signing campaign and of the certification application itself. Such news was also available by way of pre-recorded news message on one of the Society's telephone lines. Matters related to certification were discussed in meetings between Society representatives and Society-represented personnel in meeting rooms available to the Society in accordance with its historic privilege. Matters relating to certification were also discussed by delegates and by members of the Executive at meetings for which time off was permitted in accordance with the Society's privilege in that regard.

28. It was Hydro's position that it had accorded the Society these various rights and privileges in order that it could better carry out its functions within the "voluntary" relationship between them, a relationship which Hydro at all times considered to be outside the scope of the *Labour Relations Act*. Hydro had never intended that such rights and privileges be used to further an application for certification under the *Labour Relations Act*. Nevertheless, it recognized that, as it had placed no limitations on the use of those rights and privileges in the past, it could not interfere with their use by the Society for the purposes of its certification application. (In that respect, Hydro correctly anticipated the result in *University of Toronto*, [1988] OLRB Rep. Mar. 325.) When the Coalition came into existence, it sought to use the internal mail system to distribute material opposing certification of the applicant, and offered to pay for that privilege. Hydro denied its request. While not happy about it, the Coalition does not say this denial was unlawful.

29. Hydro also communicated with the affected employees concerning certification of the Society, both before the referendum was conducted and during the card-signing campaign, in printed material circulated to employees and in pre-recorded "news" tapes available on one of its telephone extensions. Much of its material was merely descriptive of the *Labour Relations Act* and its provisions; it particularly described the constraints imposed by the *Labour Relations Act* on an employer's expressing its views in connection with a certification campaign. No one suggests it transgressed those constraints. Within the limits of those constraints, however, Hydro did express its disappointment that negotiations within the framework of the "voluntary agreement" had been unsuccessful. It expressed its desire to maintain the *status quo* and suggested that the *status quo* was preferable to the results of certification from the perspective of the affected employees. For example, in a two-page memorandum dated January 31, 1986 titled "Update on Society Certification", Hydro wrote:

While the Corporation has no intention of interfering with individual decisions, the Corporation's view is that the voluntary arrangement has provided for collective negotiations in the areas of salaries, benefits, and working conditions. Yet through direct relationships between individuals and their supervisors, there has been scope to apply negotiated provisions to suit individual needs and circumstances. With certification, this changes. Individual terms and conditions of employment are those negotiated with the union, which alone is permitted to bargain on an individual's behalf as the sole bargaining agent. One result is that, more rigidity could be introduced into individual working relationships with supervisors.

The "Managerial Members" Assumption

30. As we noted at the outset, one of the major matters of dispute between the Society and those who oppose its certification is the number of Society-represented persons who would be deemed not to be "employees" for the purposes of the Act by reason of subsection 1(3)(b) because they exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations. Hydro says that nearly half of those in the group currently "represented" by the

Society under the “voluntary agreement” exercise managerial functions and would, therefore, be excluded from any bargaining unit for which the applicant could be certified under the Act. The Society denies that those persons would be excluded for that reason from the scope of the Act. It is common ground that many of the individuals in dispute are members of the Society.

31. Hydro and the Coalition took the position at the outset that an organization which included in its membership persons who exercise managerial functions could not be found to be a “trade union” within the meaning of clause 1(1)(p) of the Act, even if none of those managerial employees was or had been the means by which the respondent had participated in the formation or administration of the applicant or contributed financial or other support to it. That argument was referred to in our hearings as the “managerial members argument”. While denying the premise that clause 1(3)(b) was applicable to any of its members, the applicant argued in the alternative that the mere presence in its membership of managerial employees could not adversely affect either of the status questions. In the circumstances, there was a consensus that the question whether the applicant is a “trade union” should be addressed initially on the assumption that the disputed individuals would be found “managerial” without, however, assuming the truth of any element of any allegation of employer support.

32. In order to identify the factual issues on which answers to the status questions would turn, our decision of June 25, 1987 directed that the parties deliver detailed statements of the material facts on which they relied in connection with those questions. Those directions were supplemented in our decision of November 12, 1987, paragraphs 5 and 6 of which provided as follows:

5. Except as indicated in paragraph 6, any allegation that a person exercised managerial function within the meaning of clause 1(3)(b) of the Act or that their functions were analogous to those of one of the aforesaid representative or illustrative positions will be assumed to be true for the purpose of the Board’s initial hearings with respect to the status questions and will not be the subject of proof or challenge unless and until the Board concludes that the status questions cannot be determined without making a finding with respect to that allegation.

6. The direction in subparagraph 2(2) of the June decision continues to apply. No essential element of an allegation of the sort described in that subparagraph will be assumed to be true.

Subparagraph (2) of paragraph 2 of the June decision provided that:

Without limiting the specificity required by the direction in subparagraph (1)(a) above, any allegation that an employer or employers’ organization has participated in the formation or administration of the applicant or has contributed financial or other support to it shall include full particulars of the time(s) when and place(s) where such conduct occurred, the name(s) of the person(s) alleged to have engaged in such conduct on behalf of an employer or employer’s organization, the name(s) of [the] employer(s) or employers’ organization(s) on whose behalf those persons were acting and the means by which the alleged participation or support was accomplished.

33. None of the participants suggested that we needed to know exactly how many of the persons with respect to whom membership evidence has been submitted are persons whom Hydro and the coalition allege to be “managerial”. All seemed content to deal with the managerial members argument on the basis that a substantial portion of the challenged individuals were being treated by the Society as members at the time of the application and thereafter. Other than by a cursory review of the results of the Board clerks’ comparison of membership evidence and the lists filed by Hydro, we have not tested that assumption. Based on that cursory review, it does not seem unreasonable to suppose that the proportion of challenged persons who are members is not radically different from the proportion of Society-represented persons who are members.

Is the Applicant a "Trade Union" as defined by clause 1(1)(p) of the Labour Relations Act?

34. In ordinary use, the phrase "trade union" is generally understood to describe an organization which represents employees in dealings with their employers. Either through personal experience or from discussions with friends or relatives about their personal experiences or from reports in the media, most people have some awareness of the activities of organizations which call themselves trade unions. The trade unions which are most likely to be the subject of this experience - the "traditional" or "conventional" trade unions, those which could be described as "in the main stream of the 'labour movement'" - are similar to one another not only in their basic function but also in the way they carry out that function and in their philosophy of labour relations. As a result of this common personal or vicarious experience of certain trade unions, use of the phrase "trade union" can and often does evoke for the listener or reader certain connotations about the ideology and methodology of such an organization, the kinds of workers represented and the sort of relationships which exist between it, the workers it represents and the employers of those workers. The evidence before us suggests, for example, that the phrase "trade union" has been associated in the minds of Society-represented staff with compelled membership and with the use of strikes as the preferred means of resolving economic disputes. The secondary meanings which thus become attached to the phrase "trade union" in ordinary use can create some misunderstanding about the breadth of application of the *Labour Relations Act* and the meaning assigned by that Act to the term "trade union".

35. For purposes of the *Labour Relations Act*, the phrase "trade union" is defined very simply in clause 1(1)(p):

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

The Act's definition of "trade union" does not require commitment by the organization to the ideology or methodology of any particular labour organization or movement. While the Act permits the negotiation of compulsory membership clauses and regulates and protects the use of strikes as a means of resolving economic disputes, organizations are not excluded from the Act's definition of "trade union" if, like the Society, they prefer that such disputes be settled by other means and are content that membership in it by those it represents be voluntary. The question whether any one approach to collective bargaining better serves employee interests than another is left to be determined by the affected employees on a majoritarian basis through the exercise of their statutory right to select or reject a bargaining agent.

36. The Society has always represented itself as having as one of its purposes the representation of employees in their employment relations with Hydro. Throughout its card signing campaign (indeed, since at least November 1983, when its constitution was last amended), the Society clearly represented itself as being the sort of organization which can be certified under the *Labour Relations Act* as exclusive bargaining agent for a unit of employees. In those circumstances, it is of no consequence that the Society has from time to time, with reference to matters other than the possibility of certification, disclaimed being a "union" in contexts in which "union" appears to have meant "contentional union" or "union like OHEU". We do not accept the Coalition's argument that the Society is somehow estopped from claiming to be a "trade union" as defined by clause 1(1)(p) of the Act.

37. Prior to the decision of the Ontario Court of Appeal in *C.S.A.O. National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.*, [1972] 2 O.R. 498, 26 D.L.R. (3d) 63, 72

CLLC ¶14,118 (the “C.S.A.O. decision”), the Board seems to have thought it was its function under the *Labour Relations Act* to “confer” or “grant” an organization “trade union status” according to whether that organization seemed to the Board to be suited to the representation of employees under the Act, and to “withhold” such status if it did not. In *Oakville Trafalgar Memorial Hospital Association*, [1971] OLRB Rep. Feb. 70 (reconsideration denied [1971] OLRB Rep. Apr. 247), the Board refused to “grant” C.S.A.O. National Inc. “the status of a trade union” because its constitution provided for two classes of membership, one class having inferior rights and privileges to the other. That decision was quashed by the Ontario Court of Appeal in the *C.S.A.O.* decision. In his decision in that case, Mr. Justice Jessup observed (at p. 501 O.R.) that:

... by its interpretation of s. 1(1)(n) [now s. 1(1)(p)] the Board assumed power to deny certification to a union on the sole basis of inter-membership discrimination and the question therefore is whether the Board erred in such interpretation.

In my opinion it is clear that it did so. I see nothing in the plain language of s. 1(1)(n) permitting, much less requiring, the introduction of such a factor in the determination of whether a union is an organization within the meaning of the subsection.

At pages 504 and 505, Mr. Justice Arnup made these observations:

While the Board in its initial decision used some rather inappropriate language as to the nature of the preliminary task it was undertaking, such as that “the Board would not *confer* the status of a trade union upon any organization with such a membership structure”, and “the Board is not prepared to *grant the applicant the status* of a trade union”, and again speaks in its reasons for its reconsidered decision of “*granting an organization the status* of a trade union”, I do not place any emphasis upon the semantics involved. In my view the question the Board asked itself could be put thus:

“Is the applicant a trade union that we should recognize for the purposes of this Act? In particular, should we refuse to recognize it because of the membership provisions in its by-laws?”

In my opinion the “right question” to which the Board should have addressed itself was:

“Is the applicant a trade union as defined by the Act?”

It is clearly *not* the Board’s function to “confer” or “withhold” “the status of a trade union”, as the language of older Board decisions suggests. An entity or group of persons either is or is not a trade union, depending on whether the statutory definition is satisfied. The Board’s function is to make a finding of fact. In doing so, it is obliged not to impose requirements unsupported by the language of clause 1(1)(p) of the Act.

38. The word “organization” in clause 1(1)(p) is not itself expressly defined. The language of the clause and of other provisions of the Act provides guidance as to what is meant. Clause 1(1)(p) contemplates that the “organization” is something which is “formed” for particular purposes. The language of clauses (l) and (p) of subsection 1(1) and of other sections tell us that the organization is one of which “employees” are “members”. Sections 74, 87, 91, 92, 98, 99 and others contemplate that a trade union will have at least one “officer, official or agent” who acts or purports to act on its behalf in matters about which the Act is concerned. These characteristics - membership within a formal structure with defined purposes and action through agents - suggest that the “organization” must either be a corporation without share capital created pursuant to some statute in that behalf or an unincorporated association brought into existence in the manner contemplated by the common law. Some unions in Ontario are corporations. Most are unincorporated associations.

39. The legal nature of a trade union which is an unincorporated association was described in the following passage from the judgment of the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, [1970] 1 O.R. 129, 69 CLLC ¶14,198 (Ont. C.A.) at pp. 133-134 and 135:

... I concede at the outset that a labour union under the *Labour Relations Act*, R.S.O. 1960, c. 202, and allied legislation has a "status" conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relations to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

....

... Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelled out in the memorandum of association usually referred to as the "constitution"; the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill, Rand, J., in *Orchard et al. v. Tunney*, [1957] S.C.R. 436 at p. 445, 8 D.L.R. (2d) 273 at p. 281, stated:

... each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that the rules shall bind them in their relations to each other.

I adopt also the proposition stated by Thompson, J., in *Bimson v. Johnston et al.*, [1959] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1958] O.W.C. 217, 12 D.L.R. (2d) 379:

... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the unions constitution and by-laws ... The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.

The contract of association is not between the members and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union.

40. For the purposes of proceedings under the *Labour Relations Act*, the common law as it relates to unincorporated associations is modified in certain respects by that Act. For example, an individual who is not yet and might never be a member of the association in accordance with the provisions of its constitution may nevertheless be treated as a member for the purpose of the *Labour Relations Act*: see clause 1(1)(l) and subsection 103(4) of the Act and compare *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 et al.*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336, 70 CLLC ¶14,008 (S.C.C.). Subject to the modifications effected by the Act, the question whether something exists as an "organization ... formed for purposes that include the regulation of relations between employees and employers" is governed by the common law principles to which the Court of Appeal made reference in the passage we have quoted from *Astgen et al. v. Smith et al.*, *supra*.

41. The constitution by which the applicant's affairs have been understood to be governed since November 1983 contains the following provisions, among others:

ARTICLE I - NAME

1. The organization shall be known as The Society of Ontario Hydro Professional and Administrative Employees and shall be referred to as "The Society."

ARTICLE II - MISSION STATEMENT AND OBJECTIVES

The Society exists to represent the interests of the professional, administrative and associated employees in all aspects of their employment with Ontario Hydro.

The Society shall be empowered to serve as the collective bargaining agent for the members employees with Ontario Hydro in such a way as to achieve the economic, social and career-related objectives of the members.

• • •

ARTICLE III - MEMBERSHIP

1. (a) All employees of Ontario Hydro who are employed as professional, administrative and associated personnel shall be eligible for membership or to continue their membership in the Society.
 - (b) The following shall not be eligible for membership in the Society:
 - (i) those employees who are exercising managerial functions, or employed in a confidential capacity to such a degree that the Society and Ontario Hydro have agreed to exclude such employees from Society representation, in addition to any employee that the Ontario Labour Relations Board may deem to be excluded from the protection of the Ontario Labour Relations Act.
 - (ii) those persons legally represented by another bargaining unit.
2. Any question of qualifications or eligibility shall be referred to the Executive whose decision shall be final subject to sub-section (a) and (b) above.
3. Any question of qualifications or eligibility shall be referred to the Executive whose decision shall be final.

* * *

ARTICLE XII - FEES

1. Any change in the amount of annual fees shall be approved by referendum.
2. Any member who is in arrears more than six months shall automatically forfeit his/her membership.

* * *

ARTICLE XV - DISCIPLINE

1. Each member, Executive member or member of the Delegates' Council shall adhere to this Constitution in the conduct of the affairs of the Society and shall act at all times in the best interests of the Society.
2. The Executive shall hear and, by a unanimous vote, determine the validity of any

charge made in writing by any member that another member has violated Section 1 of this Article.

3. The Executive shall be entitled to reprimand, suspend or expel any members whom it has found to be guilty of a violation of Section 1 of this Article.
4. Any person thought to be affected by a decision of the Executive made pursuant to this Article shall be given notice in writing at least ten days in advance of the meeting at which the charge is to be dealt with, indicating the time and place of the meeting and the specific charges to be heard. Such person shall be entitled to appear and make such representations and produce such witnesses as he/she may deem advisable.
5. A decision of the Executive made pursuant to this Article may be appealed by any person affected to the next meeting of the Delegates' Council by notice in writing. Upon receipt of such notice, the Chairman of the Delegates' Council shall place the matter upon the agenda for hearing and the Delegates' Council shall, by majority vote, determine the appeal. The decision of the Delegates' Council shall be final and binding.

Article IV provides for the officers who comprise the Executive and sets out their individual and collective powers. Articles V, VI and VII provide for the election of Delegates by small groups of members and election by Delegates of Divisional/Regional Delegates ("D/R Delegates") and set out the powers and responsibilities of Delegates, D/R Delegates and of the Delegates' Council, which consists of the Executive, the D/R Delegates and the Delegates. Article VIII provides for the election of the officers by members in good standing. Articles IX and X provide for General Meetings of the members and set out the decision-making powers of membership in attendance at such meetings. Article XI provides for determination of questions by referendum of the members. Article XIII provides for internal and external audit of the Society's books. Article XIV provides that the constitution may be amended by majority of ballots cast by members in a referendum.

42. Counsel for the respondent argues that the applicant has not shown itself to be a trade union because there is insufficient evidence to show that it was established in accordance with what he describes as the Board's "requirements", including a requirement that there be "ratification" of the constitution by vote of the membership. He argues that the evidence does not show SOHPE to be the continuation of the organization which the Board found to be a trade union in 1947 and that there is no evidence that the required steps were taken at the meeting in 1956 to establish SOHPE as a brand new organization. With respect to the documents said to reflect the terms of the Society's constitution at various times after 1956, he argues that there is insufficient evidence from which we could conclude that the changes from one to the next were in each case effected in accordance with the provisions for amendment contained in the constitution then in force. He argues that the applicant has failed to produce evidence that the existing constitution or one of its predecessors was "ratified" by a vote of the membership at some point in time. It is not enough to rely, he argues, on the referendum which preceded the coming into force of the constitution by which the Society claims its members are now governed, since that referendum only purported to approve amendments to the constitution and not the constitution itself. He also argues that the constitution is inadequate because it does not prescribe a form of membership application and does not require the taking of an oath or otherwise prescribe membership obligations.

43. We agree that the evidence is insufficient to establish that the applicant is simply a continuation of the organization which was found to be a trade union in the 1947 certification decision. Such documentation as is before us with respect to the constitution of that organization and of its parent suggests that any amendment to the constitution of that organization would have required the approval in writing of the Executive Board of the parent. Even assuming that such a fundamental change as disaffiliation from its parent could have been achieved by means of amendment

to the constitution of Unit 1 or the Ontario Hydro Unit, there is no evidence that the constitution apparently discussed and approved at the meeting of its members in late 1956 was approved by the parent body. The proceedings taken by members of the Ontario Hydro Unit in 1956 with respect to that constitutional document might only have been effective, if at all, as the creation of a new organization and not as a continuation of the existing one. All that follows from this, however, is that the applicant cannot rely on the presumption created by section 105 of the Act: the Board's finding in 1947 that Unit #1 was a "trade union" is not *prima facie* evidence in this proceeding that the applicant is a trade union.

44. The issue here is whether the applicant was a "trade union" within the meaning of clause 1(1)(p) at times material to this application for certification. The application date is material, as is the period during which the evidence of membership was obtained. Except to the extent it assists the Board in assessing the applicant's status as of those material times, the question whether the applicant was a trade union at any earlier time is of no particular consequence: see *York University*, [1976] OLRB Rep. Apr. 181 at paragraph 10. When an organization's formation is followed almost immediately by an application for certification, the Board's close attention to the steps taken to create the organization is a natural consequence of the fact that there will be no other substantial evidence of the existence of the organization. When faced with an organization which claims to have been in existence for a considerable period of time, however, the Board has recognized that it will be less critical to focus on the steps originally taken to bring the organization into existence: *University of Ottawa*, [1975] OLRB Rep. Sept. 694 at paragraph 2; *Dustbane Enterprises*, [1986] OLRB Rep. May 607 at paragraph 14; *Fort Erie Duty Free Shoppe Ltd.*, (OLRB Rep. File No. 1023-87-R, decision dated September 18, 1987, unreported) at paragraph 7. It follows that it will not be critical to the Board's finding it to be a trade union that an applicant establish a technically satisfactory constitutional continuum from its date of origin to the present day.

45. In a number of its decisions, the Board has set out five steps which it has considered sufficient to bring a trade union into existence: see *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472 at paragraph 10; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797 at paragraph 11; *Canteen of Canada Limited*, [1978] OLRB Rep. Sept. 802 at paragraph 14; and *Butterfield Division, Litton Canada Inc.*, [1985] OLRB Rep. July 1001 at paragraph 8. The fourth of those steps, which these decisions speak of taking place after employees have "approved" a constitution and been "admitted into membership", involves "adoption" or "ratification" of the constitution by a vote of those who have already been admitted into membership. The Board has said that completion of all of these steps is not necessary in each case; in particular, it has said that a separate "ratification vote" is not a necessary prerequisite to the existence of a trade union: see *Zachary De Vuono*, [1969] OLRB Rep. Apr. 71 at paragraph 10 and *Local 199 U.A.W. Building Corporation*, *supra*, at paragraphs 12 through 14. Indeed, the Board has recognized that a trade union can be brought into existence by means quite different from the five steps referred to in other cases: *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889 and *Laval Tool & Mold Ltd.*, [1987] OLRB Rep. Oct. 1281.

46. Having regard to the principles outlined in the passage we have quoted from *Astgen et al. v. Smith et al.*, *supra*, and the authorities referred to therein, the only essential prerequisite to the existence of an unincorporated association of individuals is that two or more such individuals have agreed to be bound by the terms of an identifiable constitution. We were not referred to any judicial authority for the proposition that such an agreement will not be effective unless the parties to it have employed ratification votes, membership oaths or other formalities which are unnecessary to the formation of other contracts at common law. Nothing in the *Labour Relations Act*

appears to authorize the Board's insisting on such formalities. The Board cannot go beyond the reasonable meaning of the provisions of the Act in imposing "requirements" in this regard.

47. Reference was made to the Board's decision in *University of Ottawa*, [1981] OLRB Rep. Feb. 232, in support of the proposition that ratification of the constitution by a membership vote is a prerequisite to trade union status which cannot be satisfied by membership evidence alone. To the extent that decision addresses the point for which it is cited, it relies on an earlier decision in *National Steel Car Corporation Limited*, [1979] OLRB Rep. June 542. That decision stated that the Board "requires" that the often-quoted five steps be followed before it will find that a trade union has been created. In the absence of a formal ratification vote, it rejected the argument that the signing of applications for membership by employees after having been shown the constitution which they were being asked to adopt was not sufficient to establish a trade union. For reasons which we have already set out, we respectfully disagree with the proposition that proof of completion of the "five steps" is or can be a prerequisite to a finding that a "trade union" has been formed. A group of persons discussing formation of an organization may agree that they will not become parties to a complex of contracts on the terms set out in a constitution unless the constitution is ratified by a vote. In that event, the absence of a ratification vote will be of significance. Except where participants in the formation of an organization have made a ratification vote a condition precedent to their acceptance of membership obligations, a process involving a ratification vote is surely not the only way they could bring an organization "into existence". The absence of evidence of a ratification vote is not dispositive of the applicant's claim that it is a trade union.

48. No authority was offered for the proposition that an "organization" cannot be "formed" unless its constitution prescribes a form of membership application. We know of no such authority. As the unincorporated association is a "complex of contracts", admission to membership involves a change in the identity of the contracting parties which, like any change in the terms of the contract, can only be effected in one of two ways: by the express consent of all existing members, or in accordance with the terms of the constitution to which the existing members have subscribed. From the "offer and acceptance" perspective from which issues about the formation of a contract may be assessed, a non-member's application for membership is an offer to enter into a contract with the existing members on the terms set out in the constitution. The contract is made when accepted in some manner by those existing members or by some person or persons authorized by the existing members to accept on their behalf. That delegated authority may be found in the constitution; its eligibility provisions will then define the limits of that authority. While provisions facilitating admission to membership otherwise than by unanimous consent of existing members may be a practical necessity if a trade union organization is to function efficiently, it is not clear why the inclusion of such provisions in its constitution would be a legal prerequisite to formation of an organization. In any event, the provisions of Article III of the Society's constitution can fairly be interpreted as conferring on the Executive the authority to accept an applicant into membership, without constraint as to the form such an application must take. It follows, we think, that it is for the Executive to determine at first instance what form an application for membership should take. We do not accept the argument that the silence of the constitution with respect to the form of an application leaves it without some essential characteristic of an "organization" for purposes of clause 1(1)(p) of the Act.

49. The failure of a constitution to impose membership obligations would be relevant only if that failure had as its consequence failure to create a contractual relationship on whatever terms were in the constitution. Rather than enter the debate about whether "consideration" is in every event necessary to the creation of a contractual relationship, we simply note that, having regard to the language and implications of Articles XII and XIV of the Society's constitution and of the applications for membership and certificates of membership filed in this application, it is clear that

members of the Society do have obligations as members, including the obligation to pay annual fees.

50. The evidence is that a great many people have for many years prior to the 1983 referendum conducted themselves as though the Society were an organization which had long ago been formed and did have members who were governed by the terms of a constitutional document which could be identified without dispute. There is no evidence that this common premise or any action taken on the basis of it was ever challenged in a timely way. The 1983 referendum was conducted in accordance with the terms of what was then commonly presumed to be the constitution of the Society. That referendum was understood to result in the Society's having a constitution. Many people have since acknowledged in writing that they are bound by the terms of that constitution.

51. On all the evidence before us, we are satisfied that, as of the date of this application and throughout the period to which the applicant's membership relates, the applicant was "an organization ... formed for purposes that include the regulation of relations between employees and employers". Is it, however, an organization "of employees"?

52. The respondent argues that the applicant cannot be a trade union within the meaning of clause 1(1)(p) of the act because, as we assume for the purpose of our considering this particular question, a substantial percentage of its members are persons to whom clause 1(3)(b) of the Act applies and are not, consequently, "employees" within the meaning of the Act. In support of its position, the respondent relies on the 1971 decision referred to in paragraph 10 above, which is hereafter referred to as the "HEPCO" decision.

53. The HEPCO decision did not refer to *Hamilton Construction Association and Builders Exchange v. OLRB*, [1963] 2 O.R. 293, (1963) 39 D.L.R. 338, 63 CLLC ¶15,477 (Ont. H.C.). In that case, a construction trade union's application to the Board for consent to prosecute had been opposed on the ground that the applicant had within its membership superintendents and non-working foremen who, the parties agreed, were deemed not to be employees within the meaning of the Act by reason of subsection 1(3)(b). The Board had rejected the argument that an organization which included members of management could not be a "trade union". That decision became the subject of what would now be referred to as an application for judicial review. The Court's decision dismissing that application records the argument that was made:

Mr. Laidlaw argues that the *Ontario Labour Relations Act* is based on the principle of dealing with two opposing groups, namely, employers, on the one hand, and employees, on the other, and that therefore when the definition of trade union says 'means an organization of employees' rather than 'includes an organization of employees', the definition is intended to confine the membership of a trade union to employees exclusively, and further, therefore, that since the evidence clearly shows that the organization which was granted permission to prosecute by the Board had at that time within its membership those 'with managerial functions', the organization could not then be a trade union, and any finding by the Board that it was a trade union was in contravention of the Act and in violation of the true intent and meaning of the Act.

The Court concluded that:

This was a matter that the Board had jurisdiction to determine and, in view of the past history of the union and the evidence before the Board as above-mentioned, I do not consider that the action of the Board was such a disregard of its statutory duty or of the provisions of the Act or so contrary to the true intent and meaning of the Act that it would constitute an abuse of jurisdiction.... Even if the question of the said Local No. 18 being a trade union were a collateral issue and even if I could then review the evidence with a view to quashing the Board's decision, I would not disagree with the Board's finding.

54. In *Ottawa General Hospital*, [1974] OLRB Rep. Oct. 714, the Board considered whether a “managerial person” has a right, protected by what is now section 70 of the Act, to become a member of a trade union and to participate in its lawful activities. The Board concluded that the Act did not give managerial persons that right. Without specifically mentioning the decision in HEPCO, the Board went on to disassociate itself from the view that a trade union is precluded from having such persons among its membership, noting that that issue had been dealt with in the *Hamilton Construction Association* case.

55. Although not strictly speaking necessary to the determination of the question dealt with in it, the Board’s decision in *Chrysler Canada Ltd.*, [1975] OLRB Rep. Nov. 852 made the observation that:

... the very existence of section 95(2) [now 106(2)] reflects a recognition by the Legislature that determinations as to employee status may be required, either during bargaining or during the life of the collective agreement, a recognition which, in our view, *tends to negate the inference that the mere presence of management personnel within union membership ranks necessarily destroys the union’s status or nullifies the collective agreement to which it is a party.*

[emphasis added]

This theme was picked up in *Children’s Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651.

56. The applicant in that case was a staff association whose members’ dissatisfaction with the results of its dealings with their employer had led to a decision to take whatever steps might be necessary to enter into collective bargaining within the framework of the *Labour Relations Act*. It amended its constitution to exclude from membership “employees exercising managerial functions”. Although the association terminated the membership of those who it felt exercised managerial functions, the employer felt it had not gone far enough. It threatened to challenge the association’s status as a trade union if it retained in membership and sought to represent persons whom the employer considered managerial. The association maintained its position and applied for certification. The employer carried out its threat, arguing before the Board that the association could not be a trade union if it had managerial members and that the participation of those managerial members in the affairs of the association constituted employer support within the meaning of what is now section 13 of the Act. The Board concluded that the applicant was a trade union even if the employer was correct that some of its members did exercise managerial functions. This was not strictly consistent with the interpretation placed on what is now clause 1(1)(p) by the HEPCO decision. The *Children’s Aid Society* decision explained that the concern about conflict of interest expressed in the HEPCO decision was adequately dealt with by the “self-purging” feature of the applicant’s constitution, which would ensure that persons subsequently found by the Board to be managerial would not thereafter remain in its membership.

57. The correctness of the Board’s analysis in the HEPCO decision was considered at length in *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279 (“York I”) where, after reviewing the decisions to which we have referred and others, the Board said:

55. ... it does not appear to us that the Board’s jurisprudence in this area unequivocally supports the proposition that an association cannot be described as a trade union if it includes in its membership persons who, in the opinion of the Ontario Labour Relations Board, exercise managerial functions. Further, and more to the point, it is not apparent that the *Labour Relations Act* supports such a proposition.

After setting out the provisions of clause 1(1)(p), subsection 1(3)(b) and sections 3, 13, 48, 64 and 105 of the Act, the Board went on to observe that:

This Board does not “confer” or “grant” or, to use the language of the Board in the HEPCO case, “give” organizations “trade union status”. The only use in the Act of the term “status” in that connection is in the marginal note to section 105 of the Act. The actual language of that section, however, makes it clear that the Board only makes a finding of fact that an organization is a “trade union”, it does not give the organization some characteristic it does not already have. “Trade union” is a description, not an award. The only “status” or *in rem* quality which attaches to a determination that an organization fits the statutory definition is that the determination, once made, can be set up as *prima facie* evidence of that fact in subsequent proceedings involving employers and employees who were not parties to the proceedings in which the determination was first made. Sections 13 and 48 describe an organization which has been the object of employer participation or support as “a trade union”. If employer participation or support disqualified an organization of employees from being described as a “trade union”, as paragraph 12 of the *Children’s Aid Society* decision suggests, then the above quoted portions of sections 13 and 48 would be meaningless and unnecessary. On the language of sections 13 and 48, employer domination does not result in the withholding or removal of the “trade union” label; it results in a denial of certain rights which would be enjoyed by a trade union which was free of employer domination. A finding that an organization is a “trade union” must not, therefore, be conclusive as to that organization’s “status” to be recognized or certified as a bargaining agent under the *Labour Relations Act*. The Legislature’s object was to ensure that employers and bargaining agents deal at arm’s length, and to prevent employer dominated unions from standing in the way of organizational efforts of truly employer-independent trade unions. The statutory language employed to accomplish this policy does not require us to read into section 1(1)(p) a limitation based on the nature of duties performed for their employer by individual members of what would otherwise be a trade union.

56. The HEPCO case held that the phrase “organization of employees” must be read as “organization of employees only”, having regard to the precision with which the meaning of the word “employee” is limited by paragraph 1(3)(b) of the Act. That reading of the language of paragraph 1(1)(p) would exclude from trade union membership not only managerial persons, who would be considered “employees” but for the deeming provision of paragraph 1(3)(b), but also persons who are not in any sense of the word anyone’s “employee”. If that were the intention of the Legislature, then why it did it so carefully use the “person” in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions’ having members who are not “employees” because they are unemployed: see *Ottawa General Hospital*, *supra*, at paragraphs 24 and 26. While the language of section 3 of the Act does not create for managerial persons a protected right to join and participate in the Activities of a trade union, that language is clearly inconsistent with an interpretation of section 1(1)(p) which requires that the phrase “organization of employees” be read as “organization of employees only”. It is noteworthy that none of the decisions which favour the “employee only” interpretation of section 1(1)(p) makes any reference to section 3 of the Act.

57. The HEPCO “employee only” interpretation of paragraph 1(1)(p) not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to have “managerial” members, and that an “employees only” definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, paragraph 1(3)(b) comes into play and those who act on the union’s behalf in hiring, firing and directing the work of its employed staff will be excluded as “managerial”. If paragraph 1(1)(p) means what HEPCO says it does, then either those managerial persons would have to give up their union membership, or the trade union would have to give up its managers or its employees or forfeit its “status”. This is an absurd result.

58. It is important to note also that the *Labour Relations Act* expressly defines “trade union” to include provincial, national and international trade unions. Many such organizations exist. Some existed, as OSSTF did, before the Ontario Legislature enacted any collective bargaining legislation; those organizations are not disqualified as trade unions by the fact that their founders were not persons then covered by such legislation. A trade union may function in a number of jurisdictions and under a range of collective bargaining statutes. It is not disqualified as a trade union in Ontario by the fact that its members in those other jurisdictions and under those other stat-

utes are not persons covered by the Ontario *Labour Relations Act*. It can be expected that the legislature in each such other jurisdiction will have recognized that collective bargaining requires an arms-length relationship between “employees” on the one hand and their “employer” on the other, and that in the interest of both sides it is necessary to put “managerial” employees on the employer’s side of the table in shaping any particular collective bargaining relationship. It may be supposed, therefore, that each jurisdiction and each collective bargaining statute will draw that managerial line or assign the task of line drawing to a tribunal empowered to administer the statute. While the principle of separation of employer and employee interests may be clear, the result of its application may vary from jurisdiction to jurisdiction, from statute to statute and from tribunal to tribunal. A legislature may feel that the various interests involved in collective bargaining generally, or in certain employment sectors in particular, are better served by drawing the “managerial” line at a point different from that at which this Board might have drawn the line in the same circumstances. It would seem peculiar and, frankly, pretentious if we were to deny an international, national or provincial trade union the opportunity to represent Ontario employees merely because some legislative body or administrative tribunal has required it to represent persons whom we would not, by reason of their duties, have included in a bargaining unit established under the *Labour Relations Act*. It is one thing to be ever vigilant against the mischief of company dominated unions. It is quite another to insist that those organizations which appear before this Board as trade unions conduct themselves in accordance with our views of membership purity regardless of the consequences to their ability to function in other jurisdictions. When public sector unions (OPSEU, for example) come before this Board for certification under the *Labour Relations Act*, we do not require of them proof that in their representation of employees under other statutes they have not undertaken the representation of, or accepted as members, persons whose job functions might appear to us to be “managerial”.

59. We conclude that the phrase “organization of employees” in paragraph 1(1)(p) of the Act does not mean “organization of employees only”. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act will not stand in the way of a finding that the organization is a “trade union” within the meaning of paragraph 1(1)(p) of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the “potential for conflict of interest” which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at arm’s length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and 48 speak to actual employer participation and support. A speculative concern about an organization’s vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union’s general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, 55 CLLC ¶18,011, and *Canadian Iron Foundries*, 56 CLLC ¶18,027). The *Labour Relations Act* provides safeguards against the realization of any potential for conflict of interest. By virtue of section 68 of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and 48, the potential application of those sections to the trade union and, consequently, of section 64 to some one or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members’ participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one’s wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee had no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will be some cases where the absence of any explanation for the managerial employees’ membership and active participation in a trade union may support an inference of employer domination. There will be few cases where, as here, the employees’ allegedly managerial duties and concurrent trade union membership can be explained by the fact that

both are compelled by law. Thus, sections 13, 48 and 68 encourage trade unions to confine the influence of managerial members; section 64 provides a similar incentive to employers. These provisions, together with the bargaining unit's ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for "conflicts of interest" in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

58. The allegation before the Board in *York I* was that the Ontario Secondary School Teachers Federation ("OSSTF") could not be a trade union within the meaning of the Act because it included in its membership principals and vice-principals who, it was alleged, exercised managerial functions within the meaning of subparagraph 1(3)(b) of the Act. Legislation governing the teaching profession required that teachers, including principals and vice-principals, be members of OSSTF or one of the four other affiliates of the Ontario Teachers Federation ("OTF"). Legislation governing collective negotiations between teachers and school Boards require that branches of OSSTF and the other OTF affiliates represent teacher bargaining units in which principals and vice-principals are expressly included. Assuming for the purpose of analysis the truth of the assertion that principals and vice-principals exercise managerial functions from the perspective of the *Labour Relations Act*, the Board concluded in *York I* that OSSTF was a trade union despite the inclusion of such persons in its membership. Following the same analysis, other panels came to the same conclusion with respect to OSSTF in *Board of Education for the City of York*, [1985] OLRB Rep. May 767 and with respect to another OTF affiliate, the Ontario Public School Teachers' Federation, in *The Board of Education for the City of Windsor*, [1986] OLRB Rep. Mar. 378.

59. The rejection in *York I* of the Board's earlier approach in HEPCO was not limited, as the respondent argues, to circumstances in which the membership of managerial persons is compelled by other legislation or otherwise results from the organization's functioning as a bargaining agent under other legislation. The fact that such membership can arise in that way was merely one of several reasons why the Board in *York I* concluded that the phrase "organization of employees" could not be interpreted as "organization of employees only".

60. *Etna Foods of Windsor Limited*, [1986] OLRB Rep. June 710 illustrates that this analysis has not been limited to "teacher" cases. In *Etna*, *supra*, some classes of employer were eligible for membership in the applicant fisherman's organization, and its president was alleged to be a captain of a fishing boat who exercised managerial functions within the meaning of clause 1(3)(b) of the Act. It was argued that these facts precluded a finding that the organization was a trade union within the meaning of clause 1(1)(p) of the Act. In rejecting those arguments, the Board expressly adopted the reasoning in *York I* and the conclusion that "organization of employees" in clause 1(1)(p) does not mean "organization of employees only". Assuming the truth of the allegation that the organization's president was a member of management, the Board held that, while it might raise an issue under section 13, this did not preclude a finding that the organization was a "trade union" within the meaning of clause 1(1)(p) of the Act.

61. Counsel for the respondent argues that the analysis in *York I* depends for its validity on the proposition that section 3 of the Act gives managerial employees a *right* to join a trade union. He asserts that that interpretation of the word "person" in section 3 fails to take into account and is inconsistent with the interpretation placed on the *Labour Relations Act* by the Ontario Court of Appeal and the Supreme Court of Canada in *Associated Medical Services Incorporated v. Ontario Labour Relations Board et al.* [1962] O.R. 1093 (Ont. C.A.) and *Jarvis v. Associated Medical Services Ltd. et al.* (1964), 44 D.L.R. (2d) 407 (S.C.C.). The issue in those cases was whether a person to whom subsection 1(3)(b) applied was a person within the meaning of what are now sections 66 and 89 of the Act. The Ontario Court of Appeal and the majority of the Supreme Court of Canada

concluded that a person to whom clause 1(3)(b) applied was not a person to whom the protections of those sections were available.

62. The simple answer to counsel's argument is that the analysis in *York I* does not depend in the slightest on any notion that managerial employees have a protected right to join a trade union or participate in its activities. That analysis nowhere suggests that section 3 of the Act affords such a right. The fact that managerial employees have no such right is expressly acknowledged in paragraph 59 of the *York I* decision, and the decision refers with approval to the Board's decision in *Ottawa General Hospital, supra*, in which the Board concluded that managerial employees did not have such a right. As the Board said in *Ottawa General Hospital*, however, it does not follow from that conclusion that a trade union is precluded, in all circumstances, from having managerial employees among its membership: *Ottawa General Hospital, supra*, at paragraph 27, quoted in *York I* at paragraph 54.

63. Counsel for the respondent argues that the analysis in the 1971 *HEPCO* decision reflects an application of policy considerations which are as relevant today as they were then and therefore should still be applied. It does appear that the 1971 *HEPCO* decision is the result of injection of policy considerations into a process in which the panel apparently considered it its function to "give" or "withhold" "trade union status". This is precisely the perspective which was disapproved by the Ontario Court of Appeal in the 1972 *CSAO* decision. The following observations of Mr. Justice Arnup in that case (page 505 O.R., page 70 D.L.R.) are germane to consideration of counsel's policy argument:

[The Board] has found that notwithstanding the fact that the applicant herein comes within the statutory definition of a "trade union", the Board nevertheless is entitled to set up other qualifications which must be met before an applicant is entitled to be recognized as a "trade union" for the purposes of the Act. If it arrived at this result by construction of the statutory definition, then for the reasons given by Jessup, J.A., and those which I have already expressed, it erred in so doing and thereby gave itself an enlarged jurisdiction not warranted by the Act. If it reached this result other than by founding it on a construction of the statutory definition, then it equally erred and gave itself a jurisdiction it did not have.

If the policy which the Board appears to have been following, as illustrated by its present decisions and its prior decisions referred to therein, is one which as a matter of public policy should be perpetuated, then this is the function of the Legislature and not of the Board, in the same way as an existing practice of the Board was sanctioned by the Legislature in enacting the provisions now found in s.77(4) of the *Labour Relations Act*, as enacted by 1970, c.3, s.2 [now s.103(4)].

The Legislature has not since amended the Act to give the Board the power to "refuse" on policy grounds to "give status" to organizations which satisfy the definition of "trade union" set out in clause 1(1)(p) of the Act. It is not entirely clear whether the authors of the *HEPCO* decision founded its result solely on a construction of the statutory definition. Having regard to the *CSAO* decision, we are obliged to focus on that definition. We could not arrive at the same result as the panel did in *HEPCO* unless we construed the phrase "organization of employees" to mean "organization of employees only". Having regard to the analysis in *York I*, which we adopt, that is not a construction which those words can reasonably bear.

64. Counsel for the respondent argues that we should follow the *HEPCO* decision because it was made in proceedings to which, in effect, Hydro and the Society were parties. He acknowledges that the doctrine of *res judicata* is not strictly speaking applicable, but relies on the Board's observations in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501 with respect to the desirability of the Board's following its previous decisions.

65. *Oakwood Park Lodge, supra*, involved an application for certification with respect to a bargaining unit of nurses. Their employer took the position that all of its nurses exercise managerial functions. That position had been upheld by the Board three years earlier in another trade union's application for certification with respect to the same bargaining unit. The employer argued that the issue could not be relitigated in the new application. The Board observed that there were strong institutional and labour relations reasons why a tribunal in the position of the Board ought to give substantial weight to its earlier decisions, particularly decisions involving the same parties. It said that "decisions in earlier cases should not be undercut promiscuously by those in later cases. Later decisions should, unless there are overriding factors to the contrary, be consistent with those earlier cases." It also observed, as we do, that nothing in the *Labour Relations Act* obliges the Board to follow its earlier decisions. Even when the parties and issues before the Board are the same parties as between whom the same issues were disposed of in a previous proceeding, the Board has the express power, under what is now subsection 106(1), to reconsider the decision "if it considers it advisable to do so". In the result, the Board in *Oakwood Park Lodge* concluded that the applicant before it could challenge the proposition that the respondent's nurses all exercised managerial functions, notwithstanding the Board's decision to that effect three years earlier. In dismissing an application for judicial review of that decision, the court noted that

the Board is not bound to follow its previous decision. The extent to which it chooses to do so in any given case is clearly a matter within its jurisdiction to decide.

(Unreported decision dated November 3, 1981, referred to in *Medi-Park Lodges Inc. c.o.b. as Oakwood Park Lodge v. Ontario Nurses Association et al.* (1983), 83 CLLC ¶14,016 (Ont. Div. Ct.). The Board subsequently concluded that the respondent's nurses did not all exercise managerial functions, notwithstanding the earlier Board decision to that effect which, it noted, did not appear to have considered all of the Board jurisprudence bearing on the matter in dispute: *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 (application for judicial review dismissed *Medi-Park Lodges Inc. c.o.b. as Oakwood Park Lodge v. Ontario Nurses Association et al.*, *supra*).

66. The issue between the parties in the 1971 proceedings was whether SOHPEA was a trade union in 1971. That issue does not arise here. There is no question here of deference to a finding of fact in earlier proceedings between the same parties. What we are being asked to do is give deference to the reasons given in a previous decision. That decision did not deal with the apparently contrary approach taken by the Board in the earlier *Hamilton Construction Association* case. It proceeded from a perspective later disapproved by the Court of Appeal in the *CSAO* case. It did not deal with the considerations addressed in the subsequent decisions to which we have referred. Its reasoning has not been followed by the Board in matters involving other parties. In all the circumstances, we do not think it would be appropriate to constrain ourselves to apply that reasoning in this case.

67. Counsel for the Coalition argued that the Board's finding with respect to the constitutional issue and the assumption about the managerial status of members of the Society both cast doubt on proceedings taken by the Society and its Executive. Counsel noted that some of those who were members of the Executive at the time of the certification referendum and at the time this application was filed are among those assumed to be managerial. He also argued that some members of the Executive are employed on or in connection with works to which section 17 of the *Atomic Energy Control Act* applies, and that the Board's decision with respect to the constitutional issue has "deemed" them not to be employees for the purposes of the *Labour Relations Act*. Having regard to the provisions of Article III, section 1 of the Society constitution as amended November 1983, counsel argues that members of the Executive who have since been deemed not to be employees for the purpose of the *Labour Relations Act* were not then eligible to be members and,

accordingly, not eligible to be officers or members of the Executive of the Society at the time they purported to act in those capacities. He adds that many of the members who voted in the certification referenda would have been disqualified for the same reason, which would cast doubt, he argues, on the Society's authority to present this application to the Board.

68. Subsection 1(3)(b) of the Act provides that

Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial function or is employed in a confidential capacity in matters relating to labour relations.

The November 1983 amendment to the Society's constitution to make ineligible for membership "any employee that the Labour Relations Board may deem to be excluded from the protection of the Ontario Labour Relations Act" was obviously drafted with reference to subsection 1(3)(b) of the Act. Matters of constitutional jurisdiction over labour relations were not in contemplation at the time that amendment was drafted.

69. If and when the Board does find that the employment of identified individuals or of persons in identified job classifications falls outside provincial jurisdiction for labour relations purposes, it would not be apt to say that persons so identified or employed in the classifications so identified will then have been "deemed" excluded from the protection of the Ontario *Labour Relations Act* in the sense intended by the Society's constitution. The "deeming" with which the constitution is concerned is the deeming which follows from the Board's forming an opinion that an identified individual or persons employed in an identified job classification exercise managerial functions within the meaning of subsection 1(3)(b). The operative assumption at this stage is that the Board would come to such an opinion with respect to a great many of the members of the Society, including some of those who served on its Executive at times relevant to this particular argument. The premise of the argument made by counsel for the Coalition is that this provision of the constitution will retroactively terminate membership if the Board forms the requisite opinion of them. We do not accept that premise. We do not understand the constitutional provision in question to mean that persons are ineligible for membership if there is some possibility of the Board's forming such an opinion about them at some time in the future. The most sensible interpretation of the provision is that when the Board expresses the opinion that an employee exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, that employee is thenceforth ineligible for membership.

70. It does not appear to us that the prospect of findings under section 1(3)(b) that they are managerial casts doubt on the legitimacy of actions taken in the past by persons then serving on the Society's executive. Even if it did, we are not satisfied that that affects the question whether the Society is a trade union within the meaning of clause 1(1)(p). We have difficulty accepting the notion that a trade union could lose its status under the Act if there were some dispute about the eligibility for membership or for office of some members of a past Executive. If such a dispute could not affect the status of an organization previously found to be a trade union, why should it affect a finding with respect to whether the organization is a trade union? For similar reasons, we do not accept that the possibility of a decision that some members are deemed not to be employees by virtue of clause 1(3)(b) of the Act affects the validity of past actions of the Society's membership in any way relevant to the question whether it is a "trade union".

71. We conclude that the applicant is "an organization of employees formed for purposes

that include the regulation of relations between employees and employers” and, therefore, is a “trade union” as defined by clause 1(1)(p) of the Act.

Does section 13 of the Labour Relations Act prohibit certification of the Society?

72. Section 13 of the *Labour Relations Act* provides, in part, that

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it
...

For convenience, the various employer activities described in this part of section 13 will be referred to collectively as “employer support”. It is important to note immediately that such employer activities are prohibited by the *Labour Relations Act*. Whenever there has been employer support within the meaning of section 13, there is an employer who has violated section 64 of the Act, which provides that:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

73. Both Hydro and the Coalition allege that there has been “employer support” of the Society because of

- a) the involvement in its affairs, both generally and in the card-signing campaign in particular, of persons alleged to exercise managerial functions, and
- b) the provision to and use by the Society of the privileges referred to earlier in paragraphs 26, 27 and 28 of this decision.

In framing their allegations of “employer support”, both Hydro and the Coalition were most reluctant to state that Ontario Hydro had engaged in any improper behaviour. Both were obliged by our decision of June 25, 1987 to deliver written statements setting out the material facts on which they relied in support of this allegation. We specifically required that

any allegation that an employer or employers' organization has participated in the formation or administration of the applicant or has contributed financial or other support to it shall include full particulars of the time(s) when and place(s) where such conduct occurred, the name(s) of the person(s) alleged to have engaged in such conduct on behalf of an employer or employer's [sic] organization, the name(s) of employer(s) or employers' organization(s) on whose behalf those persons were acting and the means by which the alleged participation or support was accomplished.

In the statements they delivered, neither Hydro nor the Coalition expressly described any allegedly managerial person as having engaged in supportive conduct *on behalf of* Hydro or any other named employer. With respect to the involvement of allegedly managerial persons in the Society's affairs and card-signing campaign, Hydro's argument was that while it had not instructed those persons to engage in such activities, those activities were nevertheless the activities of Hydro as a matter of law because the persons who engaged in them exercise managerial functions within the meaning of subsection 1(3)(b). In addition to adopting Hydro's allegations and arguments in this regard, the Coalition argued that the activities of those persons amounted to employer support

because they would be perceived as members of management and, so, would have undue influence over the expression by employees of their wishes.

74. We were referred to a number of Board decisions with respect to section 13, and we are aware of a number of others. We do not propose to review them all in this decision. The Board's decisions in this area generally explain their application of section 13 or its companion section 48 by reference to one of two concerns. One is that a "company dominated" trade union is unable to properly represent employees because, as a result of employer support, it "does not owe its sole allegiance to those whom it seeks to represent": *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806; and see *Seafarers Training Institute*, [1984] OLRB Rep. Mar. 518. Sections 13 and 48 ensure that such "company dominated" trade unions cannot stand in the way of employees' selecting a trade union which is not beholden to their employer. The other concern to which section 13 is said to be responsive is described in *Edwards & Edwards Limited* (1952), 52 CLLC ¶17,027:

... The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section [13] need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

The need to be cautious and purposive rather than literal in its interpretation and application of section 13 has been a regular theme in the Board's decisions. If it were otherwise, section 13 could be used by employers to accomplish the very thing it was intended to prevent: interference in their employees' right to be represented by the trade union they select on a majoritarian basis.

75. The Board has on several occasions addressed the proposition that involvement in a trade union's affairs or organizing campaign by persons who exercise managerial functions within the meaning of subsection 1(3)(b) amounts to employer support within the meaning of section 13. Some older decisions suggested that it did: *Federal Packaging and Partition Company Limited*, [1972] OLRB Rep. Apr. 316; *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87; *Leamington District Memorial Hospital*, [1973] OLRB Rep. June 376. Later decisions, however, rejected the automatic application of section 13 in these circumstances, as the Board noted in *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639, where (at paragraph 6) it said this about what is now section 13:

The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other. In applying section 12 [now 13], the Board has drawn a distinction between support tendered by the employer, either directly or through persons holding managerial positions within his organization, and support tendered by persons who occupy management positions but act on their own initiative against the employer's interest in support of the interests of the employees. Although a question may arise in these latter circumstances as to the voluntariness of the membership evidence, the necessary arm's length relationship between employer and trade union may not be undermined in a manner which requires the automatic application of the section 12 bar. In rejecting the automatic application of section 12 in these circumstances (as in the *Leamington Hospital* case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the *Children's Aid Society* case, *supra*:

“... The Board recognizes that in the modern organizational setting interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf of or in the interests of the employer then undoubtedly the section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case (1964) CLLC 16,002) then it cannot be said that the employer has participated contrary to section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again section 12 should not be activated.”

(See also *Edwards and Edwards Ltd.* 52 CLLC ¶17,027, *Municipality of Casimir, Jennings and Appleby*, *supra*, *Japamco Company Limited*, *supra* and *York Steel Construction Limited*, decision dated January 24, 1980, unreported, Board File No. 1501-79-R.) The purpose of the section is to prevent the certification of a trade union which is party to a “sweetheart deal” with an employer or is the recipient of employer support so that it does not owe its sole allegiance [sic] to those whom it is certified to represent. The Board has consistently applied the section having regard to its underlying purpose.

76. The *Children's Aid Society* case referred to in this passage is the one we have already referred to in paragraph 56, in which the respondent employer attacked the status of an employee association when it applied for certification because it had not first expelled from membership all those whom the employer considered “managerial”. That part of the attack which depended on section 13 (then section 12) was dealt with in the following paragraphs of the *Children's Aid Society* decision:

14. The respondent characterizes the first issue, the section 12 [now section 13] bar, as a simple one which hinges on a Board finding under section 1(3)(b) as to the status of persons in the disputed classifications. The respondent's argument presupposes that for purposes of section 12 the prohibited participation by an “employer” or “employers' organization” in the formation or administration of a trade union includes participation by persons *later* found to be managerial under section 1(3)(b) of the Act regardless of the nature of the participation. Notwithstanding the *Leamington Hospital* case the Board does not accept this interpretation of section 12 of the Act. The Board recognizes that in the modern organizational setting the interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf of or in the interests of the employer then undoubtedly the section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case [1964] CLLC 16,002) then it cannot be said that the employer has participated contrary to section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again section 12 should not be activated. [sic]

15. The Act has been designed to allow the Board to resolve questions of employee status as they arise during a certification proceeding (section 6(1)) and as they arise during the course of bargaining or during the operation of a collective agreement (section 95(1)). These determinations do not per se undermine trade union status nor do they per se activate section 12 of the Act, nor do they per se invalidate collective agreements. The Board stated in the *Chrysler Canada Ltd.* decision [1975] OLRB Rep. Nov. 852 at para. 13:

“... The prohibitions contained in those sections of the Act ought not to be applied to persons who, while they may exercise managerial functions, are not in fact acting on behalf of management in joining or supporting the union but, rather are pursuing their own economic interests in the mistaken belief that they have the right to organize and bargain collectively under the Act. This notion was expressed in a different but analogous context in the *Air Liquid* [sic] case 64(3) CLLC para. 16,002. Moreover, there are many instances where management personnel have erroneously been thought to qualify as employees within the meaning of the Act and the Board has declared otherwise in applications under section 95(2). Indeed, the very existence of

section 95(2) reflects a recognition by the Legislature that determinations as to employee status may be required, either during bargaining or during the life of the collective agreement, a recognition which, in our view, tends to negate the inference that the mere presence of management personnel within union membership ranks necessarily destroys the union's status or nullifies the collective agreement to which it is a party."

The Act contemplates that these disputes will arise within the context of modern organizations and has provided a means for their resolution. The resolution does not necessarily affect trade union status and does not necessarily activate sections 12 or 40. The Board can see no reason why section 12 should be activated in respect of an organization seeking status as a trade union and not in similar circumstances (i.e. bargaining unit dispute) in respect of a trade union which has established status.

16. In the absence of a statutory vehicle for the determination of employee status prior to the filing of an application for certification the respondent's interpretation of section 12 would require an organization seeking recognition as a trade union to correctly guess the status under section 1(3)(b) of those it is seeking to organize, and to purge all those who *might* be managerial or risk the imposition of the section 12 bar. The result is unfair to the applicant and is inconsistent with the general application of section 12 vis-a-vis section 1(3)(b). *A finding of managerial function under section 1(3)(b) in respect of person(s) who actively participate in the formation of the trade union does not in and of itself activate section 12 of the Act. Rather a finding of managerial status in respect of these persons must be coupled with evidence which establishes that they were acting on behalf of or in the interests of the employer.*

17. There is no evidence before the Board in the instant case to suggest that any of the persons the disputed classifications were acting on behalf of or in the interests of the respondent employer. The respondent has acknowledged that the relationship between itself and the applicant was at arm's length and indeed, Mr. Watson's memo of February 12, 1976, which is reproduced in part in paragraph 7 hereof, indicates to the Board that the persons in the disputed classifications who involved themselves in the applicant's transformation did so against the wishes of the employer. In the circumstances the Board must find that even if the persons in the disputed classifications are found to exercise managerial function [sic] under section 1(3)(b) their participation in the applicant organization does not bar this application under section 12 of the Act.

[emphasis added]

77. We agree with this portion of the *Children's Aid Society* decision and with the passage it quotes from *Chrysler Canada Ltd.* We would add that uncertainties about the outcome of potential subsection 1(3)(b) disputes create difficulties for employers as well as for trade unions. If a managerial employee's participation in a trade union's affairs in every event constituted employer support to the detriment of a union under section 13 or 48, it would equally constitute a violation of the Act for which the employer was legally responsible, a violation which the employer was legally obliged to prevent. As managerial employees have no protected right to be a member of a trade union or participate in its activities, an employer could avoid liability for that sort of employer support by making it a term of their employment that its managerial employees not become members of or participate in the activities of any trade union seeking to organize the employer's employees. Why would an employer concerned enough to bring employer support to the attention of the Board not be concerned enough to take such simple steps to prevent its occurrence? The answer may be found by considering the uncertainty of outcome under subsection 1(3)(b) from the employer's perspective. If an employer instructs all those employees whom it thinks are "managerial" that they may not join a union or participate in its activities and the Board later concludes that some of them were not, the employer's instructions will have violated the Act by interfering with employee rights contrary to section 66 and possibly other provisions of the Act. Where there is the potential for some dispute over whether an employee is "managerial" or not, an employer's reluctance to instruct the employee not to participate in the union's activities and a trade union's reluctance to exclude that employee from membership are equally understandable.

78. For the purpose of this “employer support” status question there was no assumption that any member of the applicant fell within the scope of subsection 1(3)(b) at any time. Some evidence was led concerning the duties and responsibilities of some persons who were officers of the Society or otherwise acted on its behalf during the card-signing campaign or at other times. It is unnecessary for us to determine their status at this point. Even if they are persons to whom subsection 1(3)(b) was applicable at the time they solicited membership evidence or otherwise participated in the Society’s affairs, we are satisfied that they were not acting on behalf of or in the interests of Hydro in so doing. We are also satisfied (whatever might have been the relevance to or effect on this issue of a contrary finding), that no employee affected by this application could reasonably have supposed that Hydro itself supported certification of the Society or wanted its employees to support certification. Hydro’s attitude over the years and its communications to employees after it learned of the Society’s intention to seek certification made it clear that it did not support the Society in that respect.

79. Does the Society’s use of Hydro facilities in connection with its bid for certification trigger a section 13 bar? Any accommodation or arrangement between a trade union and an employer which furthers the trade union’s representation of employees of the employer could be described as supportive of the trade union. Whether such an arrangement or accommodation constitutes “employer support” within the meaning of sections 13, 48 and 64 depends on the circumstances.

80. An employer’s voluntary recognition of a trade union as bargaining agent for its employees is particularly supportive, but does not necessarily constitute “employer support”. The Act treats voluntary recognition as a legitimate way to acquire bargaining rights. It accords bargaining rights so acquired many of the same protections as are afforded the rights of a certified bargaining agent: see subsections 5(3) and 16(3) and section 60. Indeed, voluntary recognition will not necessarily constitute employer support from the Act’s perspective even when the trade union did not enjoy majority support or otherwise have the right to represent employees in the subject bargaining unit at the time recognition was granted. If voluntary recognition always constituted employer support under those circumstances, section 60 would be unnecessary and the one-year limitation on an application under that section would be meaningless. Voluntary recognition has been found to constitute employer support, however, when the trade union has no pre-existing bargaining rights for any employees of the employer and there are no employees in the subject bargaining unit at the time recognition is granted: *F. D. V. Construction*, [1984] OLRB Rep. May 719; *C. Strauss (1973) Limited*, 1975] OLRB Rep. July 581; *Sunrise Paving and Construction Company Limited*, [1972] OLRB Rep. Mar. 199 (but see *Nicholls-Radtke & Associates Limited*, [1982] OLRB Rep. July 1028). Voluntary recognition has also been treated as employer support when it occurs “in the shadow” of another trade union’s organizing campaign: see *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827.

81. Provision of employee lists to an organization created to block a trade union’s organizing campaign has been held to constitute employer support: *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509. On the other hand, not only is the provision of employee lists and other employee information to a certified trade union not “employer support”, the failure to provide the information can constitute an unfair labour practice: see *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453, 14 CLRBR (N.S.) 1 at paragraphs 30 to 34.

82. Use of premises provided by the employer has been found to constitute “employer support” when the premises are provided and used for the initial founding or organizing meeting of an employee organization: *Gillies Bros. and Co. Limited*, [1964] OLRB Rep. Dec. 420; *Basic Structure Steel Fabricators Limited*, [1966] OLRB Rep. Mar. 888; *Crowe Foundry Limited*, [1969] OLRB Rep. May 218. Remission to an organization of monies deducted from employee wages was

found to constitute employer support in *Crowe Foundry Limited* where the organization in question was brought into existence while an incumbent trade union was engaged in a strike. Deduction and remission of dues otherwise than pursuant to the terms of a collective agreement was not found to constitute employer support in *Edwards & Edwards Limited, supra*, where, as the employer had reason to believe, the trade union already had substantial support among the employees when the request for checkoff was made or acted upon.

83. Subsection 46(1) of the Act provides:

46.-(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;
- (b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;
- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.

The respondent argues that the purpose of this subsection is to permit arrangements which would otherwise constitute "employer support". It follows, the respondent argues, that any supportive arrangement not permitted by subsection 46(1) will constitute employer support. The arrangements between Hydro and the Society are not saved by this subsection, the respondent argues, because they are not reflected in the provisions of a collective agreement.

84. We agree that the provisions of subsection 46(1) put to rest any argument that arrangements of the sort described therein constitute employer support. We do not accept the proposition that any arrangement between an employer and a trade union which is supportive of the trade union's representational efforts will constitute employer support unless that arrangement falls within the four corners of subsection 46(1). That approach to the matter would introduce a literal or mechanistic approach into the interpretation and application of the "employer support" provisions. Viewed from the purposive perspective which the Board has generally adopted in dealing with the "employer support" provisions, the rationale of subsection 46(1) is that where an employer and trade union have the sort of "arm's length" relationship implicit in their being parties to a collective agreement, the introduction into that relationship of provisions of the sort referred to in subsection 46(1) does not raise the concerns to which sections 13, 48 and 64 are addressed. That rationale can bear application to provisions other than those described in paragraphs (a), (b) and (c) of subsection 46(1). This rationale should also apply to arrangements made in or arising out of arm's-length agreements even if they are not collective agreements (assuming, as Hydro argues, that an employer and an employee organization can enter into an agreement about the wages and working conditions of employees without thereby making a "collective agreement").

85. The Board has dealt in other cases with situations in which the applicant has pre-existing relationship with the respondent employer pursuant to which it has enjoyed concessions like those contemplated by subsection 46(1). The Board has approached the question whether receipt

of these concessions constitute “employer support” by asking whether the concessions were the product of “arm’s length” negotiations with the employer: *York University*, [1976] OLRB Rep. Apr. 181. In our view, that approach is consistent with the thrust of the Board’s jurisprudence. Arrangements in which an employer assists a trade union with dues deductions, use of facilities and so on have been found to constitute “employer support” when they are provided before the trade union has acquired or demonstrated any membership support among the affected employees. Such employer assistance is not seen as “employer support” when it is the result of “arm’s length” dealings which occur *after* the assisted organization has established support among the affected employees.

86. Whether or not the present applicant is the same organization as or a successor to SOHMPS, SOHPEA, SOHPE, the Ontario Hydro Unit or Unit 1 for purposes of section 62 or section 105 or a dispute at common law over the ownership of assets, the Society is the product of a history which includes all of those organizations. In terms of employee support, it traces its origins back to Unit 1. There is no suggestion that employee support of Unit 1 was the product of employer support. There is no suggestion that the 1955 expansion of the group for which the Ontario Hydro Unit was recognized involved employer support. Since then, the evidence shows that the Society or its predecessors acquired and demonstrated employee support in any new group of employees before being granted concessions in connection with the representation of that group. In the history of dealings between Hydro and the Society and its predecessors, there have been periods characterized by cooperation and periods characterized by confrontation. There is no serious suggestion by any witness that in any of those periods those dealings were other than “arm’s length”. The concessions and privileges of which the Society has made use in pursuing this application are privileges and concessions which are the result of an “arm’s length” relationship and do not, in our view, reflect “employer support” within the meaning of section 13 of the Act.

87. Accordingly, we are not persuaded that the applicant is a trade union whose certification in this application is prohibited by section 13 of the Act.

Comments

88. With respect to both status questions, the respondent and the Coalition argued that the approach taken in the *Children’s Aid Society* decision should not be applied here because, in their submission, this applicant had not engaged in a proper “purge” of management members following the amendment of its constitution in November 1983. This demonstrated, in their submission, that the “self-purging” feature inserted in the constitution at that time was merely window dressing intended to disguise the applicant’s intention to continue as a “management” organization. They argue it was not enough to terminate the membership of the few remaining ESR associate members, while retaining in membership so many other “managerial” persons. In effect, the respondent and the Coalition question the *bona fides* of the applicant’s asserted belief that none of those whom it seeks to represent falls within the scope of subsection 1(3)(b). It may be that the depth of the applicant’s belief in the correctness of the position it has taken is not relevant to the consideration of either of the status questions. Nevertheless, given the extent to which evidence and argument was directed to this point, we are inclined to make some comments about it.

89. One of the major premises of this attack on the *bona fides* of the applicant’s position is that those who fall within the group now represented by the Society as a result of exclusion from the OHEU bargaining unit must, of necessity, be persons to whom subsection 1(3)(b) applies. This presumes that application of the “managerial” and “confidential” tests articulated in the agreement between Hydro and OHEU would exclude from that unit only those who, in the opinion of

this Board, exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations.

90. The exclusionary tests in the Hydro/OHEU agreement were not designed by this Board, nor were they even agreed to by both parties to that agreement. They were imposed by an interest arbitration board in 1972. On the material before us, they reflect the position taken by Hydro at that time, a position which Hydro then sought to support by reference not only to the notion that persons to be excluded performed managerial or confidential functions but also to the notion that persons at a particular level of education and technical expertise did not share a community of interest with a vast majority of those who clearly fell within the OHEU unit. Nothing in the material before us suggests that the interest arbitration board's decision to adopt Hydro's position on the matter of exclusions ignored Hydro's argument about community of interest or was intended to precisely parallel this Board's approach to the application of subsection 1(3)(b). Even if it were so intended, it is at least noteworthy, if not significant, that many of the seminal decisions to which the Board now refers in dealing with issues under subsection 1(3)(b), particularly issues arising in connection with professional, technical and other white-collar workers, postdate the Hydro/OHEU interest arbitration decision: see *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84; *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 and the decisions referred to therein including *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261. Hydro filed with us several arbitration awards which deal with the exclusion provisions of the Hydro/OHEU agreement. And none of them suggests that those exclusionary provisions are coextensive in scope with subsection 1(3)(b). Indeed, one award recites with apparent bemusement the insistence of both Hydro and OHEU that this Board's approach to issues arising under subsection 1(3)(b) should not be considered or consulted by an arbitrator in applying the exclusionary provisions of their agreement. It is unnecessary and premature to speculate about the significance in practice of any particular arguable distinction between the exclusionary language of the Hydro/OHEU agreement and the Board's current approach to questions arising under subsection 1(3)(b) of the Act. It is enough to observe that the mere fact that a position is excluded from the OHEU/Hydro agreement cannot be determinative of the question whether that position would be excluded from the scope of any bargaining unit in this application.

91. Without suggesting that they are the only relevant considerations, it is apparent that the considerations outlined in the following passage from *The Corporation of the City of Thunder Bay*, *supra*, (at paragraph 7) would be of some significance in resolving the parties' disputes in this area:

(4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

(5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so

that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a “participatory decision-making style”. Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

These observations obviously cut two ways. Underlying them is a sense that a certain portion of any work force must, almost of necessity, consist of persons exercising managerial functions. The proposition that only a few hundred out of a work force of over 20,000 would exercise such functions to such a degree as to be excluded from the scope of the *Labour Relations Act* may seem at odds with that sense. At the same time, the observations we have quoted suggest that some organizations may so distribute decision-making as to leave only a relatively small number of persons exercising managerial functions in sufficient concentration to result in their exclusion from the scope of the *Labour Relations Act*. We do not offer these observations as any hint at the possible outcome of the parties’ dispute over the application of subsection 1(3)(b) to persons whom the applicant seeks to represent. We offer them only to explain why we do not find it unusual or implausible that there would be a genuine dispute about the applicability (apart from constitutional considerations) of subsection 1(3)(b) to a group of employees which, although numerically large, constitutes only 10 to 15 per cent of Hydro’s total work force.

92. In what might be taken as a challenge to Hydro’s *bona fides* in taking the position it has on the managerial exclusions issue, the Society observed in argument that the persons whom Hydro says would have a “conflict of interest” if placed in the bargaining unit are persons whom Hydro had for years been prepared to leave on the “other side of the table” in a collective negotiation relationship with the Society. The Society asks rhetorically “[W]hy does this so-called conflict of interest, tolerated with equanimity under an enforceable “voluntary” agreement, become intolerable under an enforceable collective agreement?” Their relationship under the “voluntary agreement” was one which both parties understood, correctly or otherwise, to be outside the scope of the *Labour Relations Act* with the consequence, among others, that those on the “other side of the table” from Hydro did not have any protected right to engage in a strike. Whether or not the availability of the right to strike should affect the point at which a line is drawn between excluded “management” and represented “workers” for the purpose of a system of collective negotiations, we note that at one point in the history of the relationship, at least, the Society’s own leadership asserted that the absence of the right to strike should result in drawing that line higher in the hierarchy than might otherwise be the case.

93. In the course of dealing with the status questions, we have seen no reason to question either the Society’s *bona fides* in asserting that none of those for whom it seeks certification would be excluded by subsection 1(3)(b) or Hydro’s *bona fides* in asserting that (subject to the effect of the constitutional issue) nearly half of those for whom the Society seeks to be certified are “managerial” from this Board’s perspective.

Issues not dealt with in this decision

94. Our findings in this decision do not involve any rejection of the concern that “managerial” employees may have been involved in collecting the membership evidence on which the applicant relies in this application. We have only rejected the argument that any such involvement constituted “employer support” within the meaning of section 13 or otherwise affected the status questions with which we are concerned in this decision. Even when that involvement does not con-

stitute employer support, a managerial employee's involvement in union organizing may raise a question whether membership evidence which he or she obtains from other employees truly reflects the desire of those employees to be represented by the trade union in collective bargaining (as membership evidence is ordinarily assumed to do). The applicant will not be certified for any bargaining unit on the basis of its membership evidence alone unless it establishes that over fifty-five per cent of the employees in that unit on the application date were "members" on the terminal date *and* the Board exercises its discretion under subsection 7(2) by certifying without a vote rather than by directing that a representation vote occur. If it turns out that employees on whose behalf membership evidence has been filed in this application either became members or maintained their membership as a result of the influence of persons exercising managerial functions, that would be a factor which the Board could take into account in exercising its discretion under subsection 7(2). We have not here applied those observations to the circumstances of this case because the effect to be given to the membership evidence filed in this application is a matter to be dealt with at a later stage of these proceedings.

95. During argument, counsel for the applicant asked us to decide whether the applicant's current agreements with Hydro constitute a "collective agreement" within the meaning of the *Labour Relations Act*, even if a finding in that regard proved unnecessary to our disposition of the status questions. The question whether the agreements between the Society and Hydro constitute a collective agreement first arose at our instigation, when we were considering whether to grant the applicant's request for a pre-hearing representation vote. We asked the parties to take a position on that question in connection with that request. The results are reflected in our decisions with respect to the request for a pre-hearing representation vote: [1987] OLRB Rep. Mar. 419 and [1987] OLRB Rep. Dec. 1589.

96. After we had concluded in March 1987 that a pre-hearing representation vote would not be conducted, we invited the participants' representations about the order in which we should deal with the issues in dispute and the procedure we should adopt in connection with the hearing of those issues. None of the participants then chose to put the status of the existing agreements directly in issue. This was not surprising. It would not have been in the interest of the parties opposed to the Society's having bargaining rights under the *Labour Relations Act* to assert that the existing agreements constituted collective agreements under that Act, since that would amount to a concession that the Society already had bargaining rights under that Act. The existence of a "collective agreement" covering the employees affected by this application would leave us without jurisdiction to entertain this application (unless it could be said that it had been filed during one of the "open periods" contemplated by subsections (4), (5) and (6) of section 5 of the Act). An assertion by the applicant of a proposition which, if true, would leave the Board without jurisdiction to entertain the application might well have led to our dismissing the application *without determining the correctness of the assertion*. That was an obvious disincentive to the applicant's pursuing the matter in this application. Another apparent reason for the Society's not having put the status of its agreements with Hydro in issue emerged during the evidence, when we heard that the Society's executive had rejected the idea of taking a "back door" route to *Labour Relations Act* coverage by taking or precipitating proceedings in which it would ask the Board to find that the Society's agreements with Hydro constituted collective agreements. They preferred to establish *Labour Relations Act* coverage of the Society's relationship with Hydro by means of a certification application based entirely on membership evidence obtained expressly for that purpose, so that the result would be based on a direct demonstration of majority support for representation by the Society in collective bargaining under the *Labour Relations Act*.

97. We were surprised, therefore, when counsel for the Society raised this question again as a distinct issue which it wished to have decided in these proceedings. By that point, the simple

answer to the request was that the two status questions were the only questions with which we were dealing in this phase of our hearings, and it would be inappropriate to deal with any other issue except to the extent that was necessary to resolve the two status questions. Any question whether the existing arrangement between the Society and Hydro constitutes a “collective agreement” within the meaning of the Act is complicated by the argument that the Society is estopped from asserting that those agreements constitute a collective agreement under the *Labour Relations Act* by reason of its having made contrary representations to its membership over a considerable period of time. There is the question whether the doctrine of estoppel can be applied in these circumstances. There is the question whether a trade union as defined in the *Labour Relations Act* can engage in the representation of employees covered by that Act except under the provisions of that Act. These are complex questions with which we would not want to deal unless it were absolutely necessary to the disposition of the matter before us. It has not proved necessary to do so in order to determine the status questions. Indeed, this certification application could be dealt with without ever resolving those questions.

98. Our answers to the status questions are not dispositive of this application. It will now be necessary for the Board to address the other issues to which we referred at the beginning of this decision. This application should therefore be relisted for hearing. Notice of hearing should be given to all those who have expressed interest in participating in the Board’s hearings with respect to any aspect of this application. On the next scheduled days of hearing, the Board will consider the representations of all those persons with respect to the procedure to be followed by the Board in resolving the remaining issues in this application.

**0878-87-R Labourers International Union of North America, Local 607, Applicant
v. Vibration Assessment Limited, Respondent**

Certification - Constitutional Law - Construction Industry -Respondent an engineering consulting company which provides vibration monitoring and assessment services - Bell Canada constructing a fiberoptic telecommunications cable - Respondent hired by construction company building cable to protect a nearby natural gas pipeline -Respondent’s argument that since the work was in relation to a pipeline the application was outside provincial jurisdiction dismissed - Board finding this to be construction work and respondent’s employees to be construction labourers

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; February 6, 1989

1. By decision dated May 18, 1988, the Board certified the applicant as the exclusive bargaining agent of all construction labourers in the employ of the respondent in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. In disposing of the matter, the Board found, at paragraph 7 of its decision, that:

- (a) This application is within the Board’s jurisdiction;

- (b) The work in which the respondent and its employees were engaged on the date of application was in the construction industry;
- (c) The three employees; Brian Munro, Martha Kutowy, and Roger Ball, were construction labourers, within the meaning of that term as used by the Board, on the date of application.

Subsequently, the respondent requested reasons for those findings. These now follow.

2. The respondent, Vibration Assessment Limited ("VAL") is an engineering consulting company which provides vibration monitoring and assessment services to anyone who requests it, including the Government of the Province of Ontario, municipalities, utilities, architects, insurance companies, construction contractors, quarry operators, railroads, and pipeline companies. Tony Yan is the principal and president of the respondent. He is a professional consulting engineer who has been designated as a specialist in explosives and blasting.

3. Bell Canada ("Bell") owns 48 per cent of TransCanada Pipelines Limited ("TCPL") and is, as such, the majority and controlling shareholder of TCPL. International Pipeline Engineering Limited ("IPEL") is a wholly-owned subsidiary of TCPL. Bell retained IPEL to provide certain engineering inspection services with respect to the construction and installation of a Bell fibreoptic telecommunications cable along the TCPL right-of-way between the Ontario-Manitoba border and (near) Barrie. TCPL owns and operates a natural gas pipeline along that right-of-way. This pipeline runs from the Alberta-Saskatchewan border to Montreal, Quebec. As such, it is subject to the jurisdiction of the Natural Energy Board which must approve any construction along the right-of-way. Bell contracted with SPIE Construction ("SPIE") to do the actual construction work, including the requisite blasting. All of that construction work was to take place within the Province of Ontario. In order to ensure that the blasting which would be a necessary part of SPIE's construction work was done in accordance with the applicable laws, codes, and TCPL's specifications, IPEL retained the respondent VAL as an independent blast monitoring consultant, rather than relying on SPIE to provide that service. VAL was responsible for reviewing the blast design, ensuring that SPIE complied with that design, monitoring the vibrations caused by the blasts, and assessing the blast results. While VAL's job was to ensure that SPIE's blasting did not damage dwellings and other structures as well, its primary responsibility was to protect the integrity of the TCPL pipeline. In addition, IPEL was appointed to be TCPL's agent with respect to the performance of some aspects of the TCPL-Bell agreement, including the blasting which would take place. Accordingly, SPIE, IPEL and VAL worked together.

4. The parties agreed that Brian Munro, Martha Kutowy, and Roger Ball were all at work for VAL in the geographic area to which this application relates on the date the application was made.

5. However, the respondent asserted that because VAL's work was in relation to the TCPL pipeline, which is a federal undertaking, the subject matter of this application was also within federal jurisdiction. It further asserted that it and its employees were not engaged in the construction industry, and that the three employees were not construction labourers at any material time.

6. The three employees in question variously describe themselves as "vibration control technicians", "blasting inspection technicians", and "vibration technicians". In this case, their primary job was to monitor the vibrations caused by SPIE's blasting operations in order to ensure that these did not exceed the pre-established acceptable level (50 millimetres per second). The parties agreed that Brian Munro's evidence with respect to the nature of the work he performed

should be accepted by the Board as representative of that of Martha Kutowy and Roger Ball as well. Mr. Munro's testimony in that respect reveals that the work he performed on the date of application is also representative of his normal working day.

7. After an early morning meeting with IPEL representatives to establish the work to be done that day, each VAL employee would go to the job site s/he had been assigned to. There, each joined the SPIE blasting crew, which was composed of construction labourers, whose blasts each was monitoring. While the SPIE employees began preparing a blast, the VAL employee set up the monitoring device s/he was using in an appropriate location on or near the TCPL pipeline. This set-up required an average of thirty minutes, but could take from as little as fifteen minutes to as long as sixty minutes, depending on the terrain. Because a "normal" blast took approximately two hours to prepare, the VAL employee then returned to the blast site where s/he observed the remaining preparations. Although it did not form a normal part of his/her duties and responsibilities, the VAL employee did on occasion, and only when s/he felt so inclined, assist in the manual labour associated with preparing a blast. S/he did this only to alleviate the boredom associated with having nothing else to do while waiting for the blast preparations to be completed.

8. After the blasts were detonated (by a SPIE employee), the VAL employee would assist in checking the blast hole to ensure that all the explosives had been detonated. S/he then returned to the monitoring device to take and read a printout of the vibrations caused by the blast. "Reading" the printout consisted of perusing it and answering "yes" or "no" or assigning a numerical value, as the case might be, to questions which the machine was programmed to ask. The machine did all or substantially all the necessary computations. This generally took approximately one and a half minutes.

9. The VAL employee then disassembled the monitoring equipment, which took approximately twenty minutes, and then moved it to another location in order to monitor the next blast.

10. The aforesaid process was repeated for each blast. In the absence of equipment problems or bad terrain, ten to fifteen blasts could be detonated in a day. On the date of application, there were seven blasts.

11. There are no formal educational or other qualifications which an individual must possess in order to be employed to perform the kind of monitoring functions performed by the VAL employees in this case. On the evidence before the Board, it appears that an individual without any previous background in explosives could be trained to perform a vibration monitoring function relatively quickly. However, some relevant education (in an engineering or technical program) or experience with explosives is desirable and VAL did seek employees who had what it considered to be some suitable combination of education and experience. Once hired, the employees were provided with a four-day training program by Mr. Yan. It is also clear, however, that such employees need not have any expertise beyond that which is possessed by a construction labourer who is employed as a blaster.

12. It appears that these particular VAL employees generally worked approximately seventy-two hours per week and were paid a salary of \$14,500.00 per year based on a forty-hour week. This breaks down to (approximately) \$278.85 per week or (approximately) \$6.97 an hour. They also received \$50.00 per day as a living allowance and \$20.00 per day as compensation for the overtime they worked.

13. The Parliament of Canada has no general jurisdiction over labour relations as such. On the contrary, labour relations is *prima facie*, a matter which is within provincial jurisdiction. The Parliament of Canada has exclusive jurisdiction over labour relations only if it is demonstrated to

be an integral part of its primary competence over some other federal work, business or undertaking (see, for example, *General Enterprises Ltd.*, [1977] 1 CLRB Rep. 432 (Canada), *Montcalm Construction Inc.*, [1978] 93 DLR 3 641, 79 CLLC ¶14,190, [1979] 1 SCR (SCC); *W. Rourke Ltd.*, [1983] OLRB Oct. 1711). The courts and labour relations tribunals have applied a functional test to determine whether or not the labour relations in issue are within federal jurisdiction; that is: does the work in which the employees are engaged form an integral part of, or is it necessarily incidental to, a federal work, undertaking or business, as a going concern? (See, for example, *Bachmeier Diamond & Percussion Drilling Co. Ltd. v. Beaver Lodge District Mine, Mill & Smelter Workers, Local Union 913*, [1962] 35 DLR 3 241 (Saskatchewan Court of Appeal); *Midvalley Construction Ltd.*, [1974] CLLC ¶16,100, aff'd. 74 CLLC ¶14,242, [1974] 6 WWR 575 (Alberta Supreme Court); *Lettercarriers Union of Canada v. Canadian Union of Postal Workers et al*, [1975] 1 SCR 178 (Supreme Court of Canada); *Montcalm Construction Inc.*, *supra*; *Northern Telecom Ltd. v. Communications Workers of Canada et al*, [1979] 98 DLR 3 1 (Supreme Court of Canada); *Re Henuset Rentals Ltd. & United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488*, [1978] CLLC ¶16,137 (Saskatchewan Labour Relations Board), aff'd. 96 DLR 3 651, 79 CLLC ¶14,194 [1979], 2 WWR 727 (Saskatchewan Queen Bench), aff'd. 119 DLR 3 639, [1981] 1 WWR 748 (Saskatchewan Court of Appeal); *Manitou Mechanical Limited*, [1978] OLRB Rep. July 657; *Brotherhood of Railway, Airline & Steamship Clerks, Freighthandlers, Express & Station Employees v. Canadian Pacific Limited & Marathon Realty Company Limited*, [1978] 1 CLRB Rep. 493 (Canada); *Tymac Launch Service Ltd. v. Canadian Brotherhood of Railway, Transport & General Workers Local 400*, [1981] CLLC ¶16,072; *Re Burnshire Mobile Maintenance Ltd. & Canada Labour Relations Board*, [1985] 22 DLR 4 748 (Federal Court of Appeal); *National Protective Guard Service Company Limited*, [1987] OLRB Rep. Feb. 245).

14. In this case, VAL's work was an integral part of, or necessarily incidental to, the construction of the Bell cable, which is itself in provincial jurisdiction. It formed no part of the ongoing operation of the TCPL pipeline and would not have been required at all but for the construction of the Bell cable. Accordingly, the Board concluded it had jurisdiction to deal with this application.

15. The work the VAL employees performed in this case was in connection with the Bell cable rather than in connection with the TCPL pipeline. Indeed, it was an integral or necessarily incidental part of that construction since the construction could not proceed without it. Accordingly, the Board concluded it was construction work.

16. Finally, the Board had to determine whether the three VAL employees were construction labourers. It is no easy matter to define that term. The *Labour Relations Act* provides no assistance in that respect. In addition, while they have never been entirely clear, the lines of demarcation between construction labourers and other trades or crafts have recently become even more blurred. Certainly, it is no longer, if it ever was, fair to say that construction labourers are necessarily unskilled or unsophisticated workers. While it may be difficult to provide any exhaustive description or definition of what a construction labourer is, it is far less difficult to "know one when you see one". In this case, the Board was satisfied that the work performed by the VAL employees is work that is commonly associated with blasting (which blasting is construction labourers' work), that it is work which can be and is done by construction labourers, and that it is not work which is identifiable or associated with any other construction trade or craft. In addition, the qualifications and abilities required, and the rate of pay associated with the work tended to suggest they were construction labourers. Accordingly, the Board found they were.

1369-88-R London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant v. Woodstock & District Association for the Mentally Retarded, Respondent v. Group of Employees, Objectors

Certification - Practice and Procedure - Ballot box ordered sealed following submissions from the union that it had not received notice of the hearing where the voluntariness of the petition had been determined - Staff of union on strike and picket line in place when notice of hearing left at union office - Union official not discovering notice until after the hearing - Board declining to reconvene hearing on the issue of the voluntariness of the petition - Failure to read the notice until after the hearing not beyond the control of the union - Board ordering ballots counted

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *D. G. Wozniak* and *H. Peacock*.

DECISION OF THE BOARD; February 10, 1989

1. This is the continuation of an application for certification. In its decision dated November 24, 1988, the Board ordered a representation vote, after finding that the petition filed by objecting employees was voluntary. The ballot box was ordered to be sealed because of the submissions of the applicant that it had not received Notice of the Hearing on the voluntariness of the petition.

2. Notice of the November 3, 1988 hearing on the issue of the voluntariness of the petition was sent by priority post to all parties to the certification application. This date was set after the first appearance of the parties on September 30, 1988, at which time the parties adjourned on consent and asked for a hearing in two weeks time in Woodstock or London. On November 3, the union did not appear. The Board waited half an hour, during which it tried unsuccessfully to reach the applicant, proceeded to hear evidence on the voluntariness of the petition, and gave an oral ruling ordering a representation vote at the end of the day.

3. On November 15, 1988, the Board received a letter dated November 9, 1988 from the union in which it claimed it had not received notice of the November 3, 1988 hearing and asked for a hearing date to present its evidence on the voluntariness of the petition. In its decision dated November 24, 1988, the Board directed the applicant to set out the material facts and submissions relied upon to establish its right to a further hearing, allowed the other parties time to respond, and said that we would then decide whether or not a further hearing would be scheduled. The union relies on the following facts, set out in its letter of December 7, 1988, to support its request for a reconvened hearing on the issue of the voluntariness of the petition:

1. On Wednesday, October 26, 1988 at 10:00 a.m. a strike by Union Representatives commenced at the Local 220 Union Office on 228 Clarence Street.
2. At this time the union Office building was closed until further notice. A notice to this effect was put on the door after the strike commenced.
3. A picket line was set up at the Union Office on the same day. No one crossed the picket line. The picket line continued until the strike was resolved (Thursday, November 17, 1988).
4. After the strike commenced the Union rented a post office box to which all mail was directed and received.
5. On Wednesday, November 9, 1988, M. Morin (Secretary-Treasurer) attended at the Union Office at 228 Clarence Street in the evening after the picket line was taken

down. As he was entering the building he noticed that an envelope from the Ontario Labour Relations Board was lying on the floor inside the building and under the mail slot in the door. He then took the unopened letter into the temporary office the following day where it was stamped. Enclosed is a copy of the Notice of Hearing date stamped November 10, 1988.

6. Enclosed is a copy of the envelope. As can be seen there is a reference to "on strike".

4. The union maintains that the facts establish that they did not receive notice until one week after the hearing and that therefore the presumption in section 113(1) of the Act is thereby displaced, relying on *Kraft Food*, [1966] OLRB Rep. Dec. 729. The objecting employees take the position that the facts set out by the union confirm that the letter was correctly addressed and correctly delivered. In their view, notice was in fact received but not read, which distinguishes this situation from the one in *Kraft Food, supra*. They point to the applicant's application for certification which set out the address for service, at which it was served. They say that this, coupled with the fact that the union did nothing from October 26, 1988, the date on which the staff struck, until November 9, 1988 when the union representative picked up the mail, constitutes receipt of notice as contemplated by section 113. They argue that the union made no effort to acknowledge receipt at that time but that this cannot change the fact of receipt.

5. *Kraft Food, supra* relied upon by the union, is a case in which the trade union sent the employer a letter by ordinary mail seeking negotiations to renew the collective agreement. The evidence disclosed that the letter was not received by the employer and therefore the Board held that the Act's presumption of receipt (now section 113) did not apply. Unfortunately the report of the decision does not indicate what the circumstances of the non-receipt were. It is therefore impossible to tell whether the situation is analogous. If notice is not received, the Board will reschedule a new hearing. See, among others, *Catalyst Technology (Canada) Limited*, [1987] OLRB Rep. Sept. 1131. The question remains whether delivery at the address given for service amounts to receipt of notice. We have considered the matter on the assumption that the facts as set out in the union's submission are true.

6. There are a variety of cases in the Board's jurisprudence which have discussed issues relevant to our consideration of this matter. These relate to various allegations of failure to give or receive notice, reconsideration applications and adjournment requests.

7. In *Swiss Chalet*, [1972] OLRB Rep. Feb. 162, there was apparently no evidence of what had happened to the notice of hearing. The evidence disclosed only the normal process of receipt of mail. In refusing to re-open and reconsider, the Board said at page 164:

It would lead to chaos if the Board would go behind the fact of service in accordance with the Act and the Rules of Procedures so as to permit parties to seek relief on the grounds of internal difficulties arising subsequent to the proper service.

8. In *M. Sullivan & Son Ltd.*, [1979] OLRB Rep. Jan. 58, the Board dealt with a situation where a section 79 complaint had been dismissed following non-appearance of the complainant. The complainant later brought a new complaint, essentially the same, which the Board refused to entertain. The union maintained that the Notice of Hearing had been held up in the mail between Toronto and Thunder Bay for a period of three weeks, and that the Notice of Hearing was not received at its Thunder Bay office until the hearing date. The business representative had seen the secretary open the mail on the day of hearing, but there was no evidence that the notice had in fact not been received at the office prior to that date. The Board took into account that the complainant did not follow up on its own complaint. The union failed to inquire of the Board why it had received no Notice of Hearing in the weeks following its application. Even when a Board officer

met with the complainant's business representative it did not appear to have voiced any concern about not having received a notice of hearing. The business representative acknowledged that the officer might have mentioned the hearing date. The Board held on the above evidence that it was not satisfied that the complainant had proved that it did not receive the Notice of Hearing in the ordinary course of the mails, and found that the complainant likely did receive the Notice of Hearing and that it was through carelessness or inadvertence that it failed to attend the hearing into the original complaint. The Board held that the absent party bears the onus of showing why the matter should be inquired into again and that where factors beyond the control of the party are not shown a careful weighing of a number of considerations must be undertaken. The Board took into account the reasons for nonattendance (inadvertence) and the nature of the complaint (involving the construction industry where employment relationships tended not to be permanent). Citing the importance of avoiding delay to a sound industrial relations policy and the orderly administration of the Act, the Board found the facts did not warrant reopening the matter.

9. In a section 68 complaint, *Amalgamated Clothing and Textile Workers' Union*, [1983] OLRB Dec. 1947, where the union failed to appear at a hearing because it had not read the Board's notice because it believed the matter was settled, the Board declined to reopen the case. The Board found that there was no reasonable excuse for the union to have concluded that there had been a settlement and that the failure to read the notice was not a *bona fide* mistake. The Board said that if the circumstances of the case were grounds for a hearing *de novo*, no proceedings before the Board would ever be final and the expeditious resolution of applications and complaints would be substantially undermined. Therefore a request for reconsideration and rehearing was dismissed.

10. In *Norben Ontario Design Ltd.*, [1984] OLRB Rep. June 851, the Board declined to reopen a case in which the respondent, who operated in both Ontario and Quebec, did not check its Post Office Box in Ontario in time to receive the Notice of Hearing. The Board, citing *Johnson Painting Co. Ltd.*, [1983] OLRB Rep. June 919, held that the Board and the public were entitled to rely upon the business address provided by the company in Ontario. The fact that the partners of the respondent emptied the mail box only once every two weeks did not establish that the respondent had not received notice of the application. The Board said:

Under the circumstances where a business address is provided for the public, the party which provided that ignores and fails to advise itself of correspondence does so at its peril. The respondent is not able to hide behind a Post Office Box for the purpose of denying a service of documents upon it. On the evidence before it, the Board is satisfied that the respondent in fact had notice of this application and could have filed a timely reply.

See also *Daugulis Company Limited*, [1969] OLRB Rep. April 128.

11. In *Ferano Construction*, [1985] OLRB Rep. Jan. 73, the respondent had not filed a reply to a certification application because the registered mail containing the request for the information was not accepted by the company on the date of its delivery, due to the absence of its controller. Referring to *Norben Ontario Design*, *supra*, the Board reaffirmed that where a business address is provided for the public the party which has provided it fails to advise itself of correspondence at its own peril and declined to reopen the matter. The Board underlined the need for finality in Board proceedings and said that it was not open to a party to raise matters later that could have been raised at the time the matter was initially considered by the Board.

12. In *Coldmatic - Refrigeration of Canada Ltd.*, [1985] OLRB Rep. July 1009, the respondent failed to attend a hearing because it "had no knowledge of any basis on which the applicant could claim to be a party to a collective agreement." After the Board's decision, the respondent

asked for reconsideration. The Board reaffirmed its policy and practice on reconsideration applications, i.e. the Board will not grant reconsideration unless a party shows that it can adduce new evidence which was not previously obtainable by reasonable diligence and that evidence would, if adduced, be practically conclusive. Further, the party must satisfy the Board that it had no opportunity to raise representations or objections previously. The Board rejected the application for reconsideration on the basis that the respondent had simply chosen not to come to the hearing.

13. In *Waterloo Glass and Mirror Ltd.*, [1984] OLRB Rep. June 883, the Board was faced with a request for an adjournment because the Notice of Hearing, although received at the applicant's offices nine days before the scheduled date for hearing, had not been brought to the attention of the business agent until two days before the hearing. Additionally, the representative was required to attend on the same day before another panel of the Board with respect to a different matter. The Board denied the adjournment, holding that late receipt by a party of a Notice of Hearing may be appropriate grounds for an adjournment but that in the facts of the case the applicant had received the notice of the hearing in plenty of time.

14. In *Soo Dairies Ltd.*, [1968] OLRB Rep. April 115, objecting employees failed to appear at a hearing due to a mistake of their solicitor; the Board declined to re-open the matter. Similarly, in *Russell Mac Vicar Ltd.*, [1980] OLRB Rep. July 1049, the Board reaffirmed that a mistake of the party or its counsel which results in a failure to attend the Board hearing is not a ground requiring reconsideration of the Board's decision or a rehearing of the original matter. At paragraph 6 it said as follows:

One of the principal purposes of an administrative agency is to process the matters that come before it with expedition and economy. This value can only be achieved if there is finality to the Board's decision in the vast majority of cases. To rehear cases because one party made a mistake and neglected to attend a hearing would substantially impair this end.

See also *Corporation of the City of Sault Ste. Marie*, [1987] OLRB Rep. Oct. 1319 where a request to reopen a matter because of a solicitor's error and failure to meet a hearing date was denied.

15. In summary, cases where notice reached the address given for service, but was not read because of administrative difficulties, mistake, or failure to inquire on behalf of the addressee, have not been considered cases where notice has not been received and matters have not been reopened. Receipt of notice has not been held to mean reading of the notice by the addressee. Rather, it has sufficed if the notice was available to be read at the address given by the party concerned. Implicit in the cases is the question of whether failure to receive notice was beyond the control of the party claiming to have not been notified.

16. Was the failure to read the notice until after the hearing beyond the control of the union? The facts set out by the union indicate that it could have read the notice earlier. It was not submitted that the union could not have picked up the mail until after the picket line was discontinued after November 17, 1988. The Secretary/Treasurer picked up the notice when he attended the office to which the notice had been addressed in the evening after the picket line was down before that date, on November 9, 1988. Further, the union did not advise the Board of any change of address for service.

17. We are of the view in the circumstances of this case that the union did receive notice; it was available for reading by them at the address it had given to the Board for service. We do not find that the facts as set out displace the presumption of receipt in section 113(1) of the Act. Therefore, we will not re-open our decision of November 24, 1988. We confirm that decision and order that the ballots from the vote be counted.

COURT PROCEEDINGS

2181-86-M; 2191-86-M (Court File No. 713/88) The Board of Education for the City of Windsor, Applicant v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 and Ontario Labour Relations Board, Respondents

Collective Agreement - Construction Industry - Employer - Judicial Review - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on “gentleman’s agreement” as constituting a bar to the union’s contracting out grievance - Board declaring “gentleman’s agreement” null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, *inter alia*, the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in determining that the Windsor Board of Education was acting as an “employer” in these circumstances -Judicial review dismissed by Divisional Court

Board decision found at [1988] OLRB Rep. March 342.

High Court of Justice, Divisional Court, Osler, Reid and Campbell JJ., January 25, 1989:

Osler J.: This case really only raises two questions, namely whether the Board’s interpretation of who is an employer in the construction industry is one that is reviewable by this Court and whether their decision that the doctrine of estoppel had no application to the present case can be reviewed. In neither case do we see anything unreasonable, or for that matter, anything wrong in what the Board has found. Accordingly the application will have to be dismissed. The respondent union will have its costs. No costs for the Board.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2371-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Regal Crest Homes; Wistonelle Investments Inc.; Panda Blue Construction Ltd.; Follesmark Construction Inc.; Hazel Briar Homes Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

3294-87-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Grace Villa Chronic Care Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in London, save and except registered nurses, graduate nurses, undergraduate nurses, paramedical employees, maintenance employees, supervisors, persons above the rank of supervisor, office, clerical and sales staff" (51 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

3471-87-R: Canadian Paperworkers Union (Applicant) v. Fournier Stands Mfg. of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the employer in Pickering, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (109 employees in unit) (*Having regard to the agreement of the parties*)

1626-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hadrian Excavating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (53 employees in unit)

1811-88-R: Seal On Paving Truckers Employee Association (Applicant) v. Seal-On Paving Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District and L.I.U.N.A., Local 625 (Intervener)

Unit: "all employees of the respondent employed in and out of Chatham, Ontario, save and except foremen, those above the rank of foreman, persons for whom any trade union held bargaining rights on the day of

application, office and sales staff, and persons regularly employed for not more than 24 hours per week” (12 employees in unit) (*Having regard to the agreement of the parties*)

1975-88-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Fortinos Supermarkets Ltd. (Respondent)

Unit: “all employees of the respondent at its warehouse operations in the City of Hamilton, save and except senior clerks, forepersons, persons above the rank of senior clerks, forepersons, office, clerical and sales staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

2000-88-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre of Cornwall, Ontario (Respondent)

Unit #1: “all lay registered and graduate nurses employed by the respondent in a nursing capacity at its Hotel Dieu Hospital in Cornwall, save and except Nurse Managers, those above the rank of Nurse Manager and those regularly employed for not more than 24 hours per week” (117 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all lay registered and graduate nurses regularly employed for not more than 24 hours per week by the respondent in a nursing capacity at its Hotel Dieu Hospital in Cornwall, save and except Nurses Managers and those above the rank of Nurse Manager” (66 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2011-88-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. Wharncliffe Loeb I.G.A. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of London, employed in the Meat Department, save and except Meat Department Manager, persons above the rank of Meat Department Manager, office and clerical employees and employees regularly scheduled for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

2012-88-R: Ottawa Newspaper Guild, Local 205, The Newspaper Guild (Applicant) v. Canadian Union of Postal Workers (Respondent) v. Office & Professional Employees Int’l Union, Local 225 (Intervener)

Unit: “all employees of the respondent employed in its Research Communications Department at its National Office in Ottawa, save and except the President and persons for whom any trade union held bargaining rights on the date of application” (6 employees in unit) (*Having regard to the agreement of the parties*)

2015-88-R: International Ladies’ Garment Workers Union, AFL:CIO:CLC (Applicant) v. Preston Manufacturing Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (50 employees in unit) (*Having regard to the agreement of the parties*)

2080-88-R: United Steelworkers of America (Applicant) v. The Service Employees International Union, Local 268 (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

2110-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Pulsar Plastics Inc. (Respondent)

Unit: “all employees of the respondent in London, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

2128-88-R: Canadian Union of Public Employees (Applicant) v. The Big Sister Association of Metropolitan Toronto o/a Huntley Youth Services (Respondent)

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

2134-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. North Shore Board of Education (Respondent)

Unit: “all office and clerical employees of the respondent in the Towns of Blind River and Elliot Lake, The Village of Iron Bridge and the Township of Shedden, save and except managers, persons above the rank of manager, secretary to the director of education, executive secretary to the superintendent of business and persons in bargaining units for which any trade union held bargaining rights as of December 2, 1988” (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2135-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The North Shore Board of Education (Respondent)

Unit: “all employees of the respondent in the Towns of Blind River and Elliot Lake, The Village of Iron Bridge and the Township of Shedden, save and except managers, persons above the rank of manager, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of December 2, 1988” (40 employees in unit) (*Having regard to the agreement of the parties*)

2170-88-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Volcano Inc. c.o.b. as Melinco (Respondent) v. Labourers’ International Union of North America, Ontario Provincial District Council (Intervener)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2172-88-R: IWA-Canada (Applicant) v. MacMillan Bloedel Building Materials Ltd. (Respondent)

Unit: “all employees of the respondent in the Township of Paiponge, save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

2173-88-R: Canadian Union of Public Employees (Applicant) v. The Metropolitan Toronto School Board (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, engaged in custodial and maintenance operations, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of December 5, 1988” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2174-88-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. The Oshawa Group Ltd. (Respondent)

Unit #1: “all employees of the respondent at its stores in the Town of Ancaster, save and except assistant manager, meat manager, persons above the rank of meat manager and persons regularly employed for not more than 24 hours per week” (7 employees in unit)

Unit #2: “all employees of the respondent at its stores in the Town of Ancaster regularly employed for not more than 24 hours per week, save and except assistant manager, meat manager and persons above the rank of meat manager” (15 employees in unit)

2182-88-R: Energy & Chemical Workers Union (Applicant) v. Serviplast Inc. (Respondent)

Unit: "all employees of the respondent in Moore Township, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of December 7, 1988" (5 employees in unit) (*Having regard to the agreement of the parties*)

2183-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Murphy Distributing Ltd. (Respondent)

Unit: "all office and clerical employees of the respondent in the City of St. Catharines, save and except office manager, persons above the rank of office manager, salespersons and persons in bargaining units for which any trade union held bargaining rights as of December 7, 1988" (4 employees in unit) (*Having regard to the agreement of the parties*)

2187-88-R: Ontario Nurses' Association (Applicant) v. Corporation of the County of Elgin (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Malahide, save and except Director of Nursing and persons above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*)

2191-88-R: Hotel & Restaurant Employees' & Bartenders' Union, Local 604, AFL:CIO:CLC (Applicant) v. 408762 Ontario Ltd. o/a Montreal House (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 14 hours per week at its Montreal House at Peterborough, Ontario, save and except assistant manager, persons above the rank of assistant manager" (3 employees in unit)

2193-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 388137 Ontario Ltd. c.o.b. as P.M. Displays/Party Time Rentals (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

2206-88-R: London & District Services Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Winston Hall Nursing Homes Ltd. (Respondent)

Unit: "all nursing home employees of the respondent in Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

2217-88-R: United Steelworkers of America (Applicant) v. Woodstream Corporation (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, home wrappers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (53 employees in unit) (*Having regard to the agreement of the parties*)

2220-88-R: Canadian Union of Public Employees (Applicant) v. Georgetown & District Memorial Hospital (Respondent) v. Ontario Public Service Employees Union, (Intervener)

Unit: "all employees of the respondent at its hospital in Georgetown regularly employed for not more than 20 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor/foreman, engineers, office staff and persons in bargaining units for which any trade union held bargaining rights as of December 8, 1988" (55 employees in unit) (*Having regard to the agreement of the parties*)

2221-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Trim Trends Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Whitby, save and except foremen, persons above the rank of foreman, office and sales staff, engineers, technical staff and students employed during the school vacation period” (129 employees in unit) (*Having regard to the agreement of the parties*)

2222-88-R: Ontario Public Service Employees Union (Applicant) v. Joseph Brant Memorial Hospital (Respondent)

Unit: “all medical laboratory, radiology and nuclear medicine technologists, technicians and assistants regularly employed by the respondent for not more than 24 hours per week and students employed during the school vacation period in Burlington, save and except Assistant Chief Technologist and those above the rank of Assistant Chief Technologist, Clinical Instructor, students in training, office and clerical employees and persons in bargaining units for which any trade union held bargaining rights as of December 9, 1988” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2227-88-R: Ironworkers District Council of Ontario (Applicant) v. J. P. Sweeney & Associates Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all other sectors in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2235-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Geo Robson Construction (Weston) Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2247-88-R: Canadian Union of Public Employees (Applicant) v. Oshawa & District Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Durham employed in its supported independent living services, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of December 12, 1988” (14 employees in unit) (*Having regard to the agreement of the parties*)

2248-88-R: Canadian Union of Public Employees (Applicant) v. Durham Recycling Centre Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Whitby, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (33 employees in unit) (*Having regard to the agreement of the parties*)

2250-88-R: Service Employees’ International Union, Local 204 affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Community Lifecare Inc. o/a Pine Villa (Respondent)

Unit: “all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, administrative assistant and persons in bargaining units for which any trade union held bargaining rights as of December 14, 1988” (3 employees in unit) (*Having regard to the agreement of the parties*)

2264-88-R: United Food & Commercial Workers International Union, Local 175 Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent)

Unit #1: "all employees of the respondent in its Caressant Care Retirement Home in Fergus, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office, clerical and maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in its Caressant Care Retirement Home in Fergus regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office, clerical and maintenance staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

2270-88-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: "all employees of the respondent in Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

2282-88-R: United Steelworkers of America (Applicant) v. Northway Metal Fabricators Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sudbury, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

2285-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Krause Enterprises (Eastern) Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2394-88-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Regional Glass & Mirror (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foreman and persons above the rank of non-working foreman" (3 employees in unit)

2558-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 673914 Ontario Inc. o/a Imperial Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0226-88-R: Christian Labour Association of Canada (Applicant) v. Reitzel Heating & Sheet Metal Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 562 (Intervener)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Waterloo except that portion of the geographic Township of Beverly annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

0573-88-R: Ontario Secondary School Teachers' Federation (Applicant) v. Sudbury Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in The District of Sudbury, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (189 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	29
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	2
Ballots segregated and not counted	5

1874-88-R: United Steelworkers of America (Applicant) v. Concrete Pipe Company A Standard Industries Company Division of Lafarge Canada Inc. (Respondent) v. Teamsters, Local 230, Ready Mix, Building Supply Hydro and Construction Drivers, Warehousemen & Helpers (Intervener)

Unit: "all employees of the employer engaged in the production and distribution of Concrete Pipe at 1555 Matheson Boulevard, Mississauga, save and except foremen, those above the rank of foreman, office and sales staff, and those represented by any other bargaining agent as of January 12, 1989" (114 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	114
Number of persons who cast ballots	100
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	92
Number of ballots marked in favour of intervener	7

1928-88-R: Canadian Paperworkers Union (Applicant) v. Patricia Region Senior Services Inc. (Respondent)

Unit: "all employees of the respondent at its Patricia Gardens Minimal Care Home Division in Dryden, save and except supervisors, persons above the rank of supervisor, administrative secretary, students employed during the school vacation period and persons employed under special funding grants from Federal, Provincial and Municipal governments" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	6

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1691-88-R: International Union of Bricklayers & Allied Craftsmen, Local 6 (Applicant) v. D. Barnett & Co. Ltd., (Respondent)

Unit: "all employees of the respondent in the Village of Thamesville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	6

1704-88-R: Service Employees' International Union, Local 532 affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Dallov Holdings Ltd. c.o.b. as Maple Villa Nursing Home (Respondent)

Unit: "all employees of the respondent in the City of Burlington regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	15
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	0
Ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

2181-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the Regional Municipality of Peel (Respondent) (609 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1163-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Allan Candy Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, security staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons employed through a co-operative education program" (353 employees in unit) (*Having regard to the agreement of the parties*) (Vote not counted)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1107-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Woodham Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and

Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	4

1139-88-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Lady York Food Market Ltd. (Respondent)

Unit: “all employees of the respondent at its retail stores in Metropolitan Toronto, save and except store manager, persons above the rank of store manager, meat department employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (30 employees in unit)

Number of names of persons on revised voters’ list	11
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	7
Ballots segregated and not counted	1

1643-88-R: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. D. Barnett & Co. Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Waterloo, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (21 employees in unit)

Number of names of persons on revised voters’ list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	9

1793-88-R: Ontario Public Service Employees Union (Applicant) v. The Grey Bruce Regional Health Centre (Respondent)

Unit: “all paramedical employees employed in the Grey Bruce Regional Health Centre, Owen Sound, for not more than twenty-four (24) hours per week and students employed during the summer vacation period, save and except chief laboratory technologist, technical director of diagnostic imaging, chief radiology technologist, chief ultrasound technologist, director of rehabilitation therapy, manager of physiotherapy, manager of occupational therapy, manager of speech pathology and audiology, director of food services, assistant director of food services, director of pharmacy, assistant director of pharmacy, director of medical records, assistant director of medical records, director of social work, director of electrodiagnostic services, chief nuclear technologist, director of respiratory technology, director of psychology, physicians and persons covered by subsisting collective agreements as of October 26, 1988” (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	40
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	10

Applications for Certification Withdrawn

3526-87-R; 0026-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Avro Construction Inc., The Avro Group, Avro Developments Ltd., Avro Management Ltd. c.o.b. as The Avro Group and Structform International Ltd. (Respondents) v. Structform International Ltd. and Labourers’ International Union of North America, Local 183 (Intervenors)

1276-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. R. L. Coolsaet of Canada Ltd. (Respondent)

1595-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Times Development (Respondent)

2021-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Excellence Home Improvements (Respondent)

2062-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Polar Aluminium & Steel Tile (Respondent)

2064-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E & J Aluminium Building Products Ltd. (Respondent)

2087-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E & M Exterior Finishings (Respondent)

2186-88-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Corneil Transport Ltd. (Canada Transport Ltd.) (Respondent)

2275-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Special Foundations Systems Co. (Respondent)

2585-88-R: Service Employees Union, Local 268 (Applicant) v. Central Park Lodge (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2045-88-FC: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Applicant) v. Del Equipment Ltd., Del Hydraulics Ltd. & Edinburgh Electric Ltd. (Respondent) (*Withdrawn*)

2258-88-FC: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agostino Casavia Carpentry (Respondent) (*Granted*)

2281-88-FC: United Steelworkers of America (Applicant) v. Canadian Feed Screws Mfg. Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0495-87-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Progress Fab Ltd., Specialty Welding and Machine Co. Ltd., and Alloy Fab Ltd. (Respondents) (*Withdrawn*)

3278-87-R: The I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Locals 105 & 804 (Applicants) v. Morell Electric Ltd. 694643 Ontario Ltd. c.o.b. as O'Connor Electric (Respondents) (*Withdrawn*)

0391-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Kor-Ban Inc. and Spencer Construction Company Ltd. (Respondents) (*Granted*)

2016-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Progress Fab Ltd., Specialty Welding & Machine Co. Ltd., and Alloy Fab Ltd. (Respondents) v. J. Lenard Hakker and Case Zylstra (Intervenors) (*Withdrawn*)

SALE OF A BUSINESS

3278-87-R: The I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Locals 105 & 804 (Applicants) v. Morell Electric Ltd. 694643 Ontario Limited c.o.b. O'Connor Electric (Respondents) (*Withdrawn*)

0917-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Kor-Ban Inc. and Spencer Construction Company Ltd. (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1077-88-R: Vasileios Goniotakis and Group of Employees (Applicant) v. International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' Union, Local 280 (Respondent) v. Cajega Enterprises Ltd. c.o.b. New Shamrock Hotel (1987) (Intervener)

Unit: "all full-time and part-time male and female employees employed in the beverage departments in the licensed establishment, as tapmen, bartenders, beverage waiters, (including waiter) who operate automatic beer dispensers or other automatic dispensing equipment, bar boys and improvers and any other new classification relating to the serving of all alcoholic beverages" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

1326-88-R: Martin Habib (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) v. Walloy Excavating Ltd. (Intervener) (*Withdrawn*)

1503-88-R: J. Lenard Hakker (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Respondent) v. Alloy Fab Ltd. (Intervener) v. Group of Employees (Objectors) (13 employees in unit) (*Dismissed*)

1765-88-R: Flora Floropoulos (Applicant) v. Energy & Chemical Workers Union, Local 59 (Respondent) v. Nucro Technics Ltd. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the intervener at Metropolitan Toronto, save and except director, persons above the rank of director, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (32 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	30
Number of persons who cast ballots	27
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	19

1790-88-R: Christopher Hood & Employees of 696254 Ontario Ltd. c.o.b. 'Notes' (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local, The Retail, Wholesale, Hotel & Restaurant Employee's Union, Local 448 (Respondent) (13 employees in unit) (*Dismissed*)

1827-88-R: Kula Sellaththurai (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employee's & Bartenders' Int'l Union (Respondent) v. Pajelle Investments Ltd. (Intervener)

Unit: "all full-time and part-time male and female employees in the beverage departments in the licensed establishment hereto as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer

dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages" (8 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

1828-88-R: Gordon Shergold (Applicant) v. Toronto Typographical Union No. 91 (Respondent) v. Trio Press (Intervener)

Unit: "all employees of Trio Press in the City of Mississauga, save and except foremen, persons above the rank of foremen, office and sales staff and students employed during the school vacation period" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

1927-88-R: Robert St. John (Applicant) v. Great Lakes Fishermen & Allied Workers' Union (Respondent) v. Murray & Ken Loop Fishery Ltd. (Intervener) (*Withdrawn*)

1974-88-R: Bradley Shoemaker (Applicant) v. Ontario Council of the International Brotherhood of Painters & Allied Trades and Glaziers & Metal Mechanics, Local 1824 of the International Brotherhood of Painters & Allied Trades (Respondent) (3 employees in unit) (*Granted*)

1982-88-R: David T. MacLean (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Retco Industries Ltd. (Intervener) (*Withdrawn*)

2002-88-R: Alan Boyce et al (Applicants) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Respondent) v. 408464 Ontario Ltd. c.o.b. Upper Village Furniture Mfg. (Intervener) (10 employees in unit) (*Granted*)

2027-88-R: Jean Paul Leroux (Applicant) v. Energy & Chemical Workers Union (Respondent) v. Chinook Chemicals Company (Intervener)

Unit: "all employees of the respondent employed as long haul truck drivers, working at or out of its plant in Sombra, Ontario, save and except supervisors, persons above the rank of supervisor, technical innovation personnel, office and sales staff, persons employed in a co-operative training programme in a recognized university, college or school, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of the 31st day of August, 1987" (13 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	6

2108-88-R: Doris Abbot (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2151-88-R: Zorka Blume (Applicant) v. United Steelworkers of America (Respondent) v. Tate Access Floor Inc. (Intervener) (52 employees in unit) (*Granted*)

2279-88-R: John Manley (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W.) and its Local 124 (Respondent) (8 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2461-88-U; 2462-88-U: Disabled & Aged Regional Transit System (Applicant) v. Canadian Union of Public Employees and its Local 839, Sharon Hachey & Ronald Mariash (Respondents) (*Dismissed*)

2542-88-U: Blue Line Taxi Co. Ltd. (Applicant) v. Local 1688, The Ontario Taxi Association and its Parent, The Retail, Wholesale & Department Store Union, Godwin Smith, Ali Javanshirnia and Harry Ghadban (Respondents) (*Granted*)

2545-88-U: E. S. Fox Ltd. (Applicant) v. J. Gary Provost (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3118-87-U: George Sarkis, Luke Horth & Doug Smilanich (Complainants) v. Labourers' International Union of North America, Local 837, Nicolo Scibetta, George Wimpey of Canada Ltd. (Respondents) (*Withdrawn*)

3126-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. N.I. Wheels (Respondent) (*Withdrawn*)

3333-87-U: Jerald Worobel (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers (U.A.W.), Local 525 and CAW TCA Canada (Respondents) v. Inglis Ltd. (Intervener) (*Withdrawn*)

3507-87-U: Eleanor Mahood (Complainant) v. Charlotte Burden, Ray Fredette, The Ontario Catholic Occasional Teachers' Association, The Ontario English Catholic Teachers' Association, and The Dufferin-Peel Roman Catholic Separate School Board (Respondents) (*Dismissed*)

3566-87-U: Ontario Public Service Employees Union (Complainant) v. Seneca College of Applied Arts & Technology (Respondent) (*Withdrawn*)

0025-88-U: Amalgamated Clothing & Textile Workers Union and its Local Union 2426 (Complainant) v. Ranpro Inc. (Respondent) (*Withdrawn*)

0338-88-U: Retail, Wholesale & Department Store Union, Local 414 (Complainant) v. Willett Foods Ltd., Loblaw Companies Ltd., & Graham Arnold (Respondents) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Withdrawn*)

0898-88-U: Penny L. Friars (Complainant) v. Canadian Union of Public Employees and its Local 1473 and Sisters of St. Joseph Diocese of Peterborough o/a St. Joseph's Hospital, Parry Sound (Respondents) (*Withdrawn*)

0951-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Ronal Canada Inc. (Respondent) (*Dismissed*)

1580-88-U: Barry A. Dennison (Complainant) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees Union, Local 351 (Respondent) (*Withdrawn*)

1696-88-U: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Westburne Industrial Enterprises Ltd. (Respondent) (*Withdrawn*)

1721-88-U: United Steelworkers of America (Complainant) v. Raypak Thermonics (Canada) Ltd. (Respondent) (*Withdrawn*)

1742-88-U: Hotel Employees & Restaurant Employees Union, Local 604 (Complainant) v. 564002 Ontario Ltd. c.o.b. as Trent Inn (Respondent) (*Withdrawn*)

1745-88-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Lake Erie Foods Inc., and Nick Rubino (Respondents) (*Withdrawn*)

1749-88-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. MacLean's Magazine (Respondent) (*Withdrawn*)

1817-88-U: Jerry V. Green (Complainant) v. District 25, OSSTF (Respondent) (*Withdrawn*)

1823-88-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bruman Leasing Ltd. (Respondent) (*Withdrawn*)

1852-88-U: Hotel Employees & Restaurant Employees Union, Local 75 (Complainant) v. Chimo Hotels (Respondent) (*Withdrawn*)

1868-88-U: Vince Bonello, Tom Giglione, Meaden Kresina, Gerry Ruwhaf, Brian Dinning, Cecil Davis & Ken McLeod (Complainants) v. United Steelworkers of America, Local 6868 (Respondent) (*Withdrawn*)

1869-88-U: Vincent Chiarelli (Complainant) v. Teamsters Local No. 230 and Concrete Pipe Company (Respondents) (*Withdrawn*)

2054-88-U: George M. Iwasykiw (Complainant) v. Local 2251 of the United Steelworkers of America (Respondent) v. The Algoma Steel Corporation Ltd. (Intervener) (*Withdrawn*)

2061-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 2225 (Complainant) v. LOF Glass Canada Ltd. (Respondent) (*Granted*)

2096-88-U: Mr. Klaas J. L. Stoker (Complainant) v. Canadian Union of Electrical Workers, Local 2 (Respondent) (*Withdrawn*)

2104-88-U: Service Employees Union, Local 183 (Complainant) v. Edward Street Manor Nursing Home (Respondent) (*Withdrawn*)

2107-88-U: International Ladies' Garment Workers Union, AFL:CIO:CLC (Complainant) v. Preston Manufacturing Ltd. (Respondent) (*Withdrawn*)

2130-88-U: Canadian Union of Public Employees (Complainant) v. Toronto Western Hospital (Respondent) (*Withdrawn*)

2120-88-U: Energy & Chemical Workers Union (Complainant) v. Chinook Chemicals Company (Respondent) (*Withdrawn*)

2143-88-U: Canadian Union of Public Employees, Local 161 (Complainant) v. Laurentian Hospital (Respondent) (*Withdrawn*)

2209-88-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. Berto's Restaurant Inc. (Respondent) (*Withdrawn*)

2214-88-U: Cheryl Rochon and Group of Employees (Complainant) v. Retail, Wholesale & Department Store Union, Local 1688 (Respondent) (*Withdrawn*)

2234-88-U: United Food & Commercial Workers Union, Local 175 (Complainant) v. D. H. Foods (Marathon) Ltd. (Respondent) (*Withdrawn*)

2251-88-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Susan Shoe Industries Ltd. (Respondent) (*Withdrawn*)

2265-88-U: Service Employees' Union, Local 183 (Complainant) v. The Quinte Hearing Handicapped Community Services Association Inc. 'Sign Inn' (Respondent) (*Withdrawn*)

2280-88-U: Canadian Union of Education Workers, Local 2 (Complainant) v. University of Toronto (Respondent) (*Withdrawn*)

2297-88-U: International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Black Swan Tavern (Respondent) (*Withdrawn*)

2305-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW) (Complainant) v. Spinrite Yarns & Dyers Ltd. (Respondent) (*Withdrawn*)

2355-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), & its Local 303 (Complainant) v. Del Equipment Ltd., Del Hydraulics Ltd. & Edinburgh Electric Ltd. (Respondent) (*Withdrawn*)

2366-88-U: Del Equipment Ltd., Del Hydraulics and Edinburgh Electric Ltd. (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Respondent) (*Withdrawn*)

2408-88-U: Thomas F. Price (Complainant) v. Trillium Personnel Inc. (Respondent) (*Dismissed*)

2410-88-U: Hotel, Motel & Restaurant Employees Union, Local 442 (AFL:CIO:CLC) (Complainant) v. Berto's Restaurant and Tom Ryan Jnr. (Respondent) (*Withdrawn*)

2411-88-U: Hotel, Motel & Restaurant Employees Union, Local 442 (AFL:CIO:CLC) (Complainant) v. Berto's Restaurant (Respondent) (*Withdrawn*)

2416-88-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Action Electrical Ltd. (Respondent) (*Withdrawn*)

2460-88-U: Balford Lindsay (Complainant) v. Budd Canada Inc. (Respondent) (*Dismissed*)

2561-88-U: Ernest Pardy (Complainant) v. Hoffman Meats (Respondent) (*Dismissed*)

2580-88-U: United Steelworkers of America (Complainant) v. WCA Canada Inc. (Collins & Aikman Division) (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1951-88-M: Jose Rodrigues Silva (Applicant) v. International Association of Machinists & Aerospace Workers (Respondent Trade Union) v. Calvanire Industries Ltd. (Respondent Employer) (*Dismissed*)

2226-88-M: Ronald Wayne Bridges (Applicant) v. Teamsters Local No. 879 (Respondent Trade Union) v. Cronkwright Transport Ltd. (Respondent Employer) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2079-88-M: Braun Wood Application Ltd. (Employer) v. Service Employees Union, Local 183 (Trade Union) (*Granted*)

FINANCIAL STATEMENT

2013-88-M: Ivan Gudelj (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Formerly the International Molders & Allied Workers Union, Local 64 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0299-88-M: Canadian Union of Public Employees, Local 2863 (Applicant) v. Willows Estate Nursing Home (Respondent) (*Dismissed*)

0627-88-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Corporation of the Town of Amherstburg (Respondent) (*Withdrawn*)

1123-88-M: Eleanor Mahood (Complainant) v. Ray Fredette, The Dufferin-Peel Local of the Ontario Catholic Occasional Teachers' Association, The Ontario Catholic Occasional Teachers' Association, and The Ontario English Catholic Teachers' Association (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2774-87-OH: Terry Prince (Complainant) v. Euramca International Company Ltd. (Respondent) (*Withdrawn*)

3277-87-OH: Philip A. Heath (Complainant) v. Butler Metal Products (Respondent) (*Dismissed*)

0520-88-OH: Mark Doucette (Complainant) v. Continuous Colour Coat Ltd. (Respondent) (*Dismissed*)

1553-88-OH: United Food & Commercial Workers' International Union, Local 139 and Danny Shinn (Complainants) v. Hoffman Meats (Respondent) (*Withdrawn*)

1950-88-OH: William T. Murray (Complainant) v. Claude Hadley, Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000, and Ontario Hydro (Respondents) (*Dismissed*)

2184-88-OH: Patrick Williams (Complainant) v. Martin Emonts (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2825-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G.C. Carpentry, Pilan Properties Ltd. (Respondent) (*Withdrawn*)

0919-88-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Cooper Corporation Ltd. (Respondent) (*Withdrawn*)

0920-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Cooper Corporation Ltd. (Respondent) (*Withdrawn*)

1243-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Withdrawn*)

1478-88-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Capital Construction Corporation (Respondent) (*Withdrawn*)

1525-88-G: Ontario Allied Construction Trades Council & Labourers' International Union of North America, Local 1059 (Applicant) v. Stemmler Wood Products, S.G.T. Enterprises, and Ontario Hydro (Respondent) (*Withdrawn*)

1561-88-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Les Constructions Michel Prudhomme Ltee. c.o.b. as M. Prud'Homme Roofing Ltd. (Respondent) (*Granted*)

1586-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lincoln Carpentry Ltd. (Respondent) (*Granted*)

1678-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Romko Excavating Inc. (Respondent) (*Granted*)

1730-88-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 (Applicants) v. Acme Building & Construction Ltd. and General Leaseholds Ltd. (Respondents) (*Granted*)

1776-88-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Les Constructions Michel Prudhomme Ltee. c.o.b. as M. Prud'Homme Roofing Ltd. and Airtight Roofing Inc. (Respondents) (*Granted*)

1992-88-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Cambrian Elevator Ltd. (Respondent) (*Granted*)

2026-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Con-Elco Ltd. (Respondent) (*Withdrawn*)

2089-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Venshore Mechanical Ltd. (Respondent) (*Granted*)

2092-88-G: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. (Respondent) (*Granted*)

2102-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. T. O'Leary Construction Corp. (Respondent) (*Withdrawn*)

2146-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ball Brothers Ltd. (Respondent) (*Withdrawn*)

2165-88-G: Millwright District Council of Ontario (Applicant) v. Canadian Machinery Movers (Respondent) (*Granted*)

2179-88-G: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. (Respondent) (*Granted*)

2180-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Menkes Developments Inc. (Respondent) (*Withdrawn*)

2223-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. M N T Builders Ltd. (Respondent) (*Withdrawn*)

2262-88-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Whyte & Braniff Glass Ltd. (Respondent) (*Withdrawn*)

2274-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Carlesimo Steel Ltd. (Respondent) (*Withdrawn*)

2286-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Itarcan Construction Inc. (Respondent) (*Withdrawn*)

2288-88-G: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall & District Contracting Ltd./Al's Steeplejack Service (Respondent) (*Withdrawn*)

2293-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. Ellis Don (Respondent) (*Withdrawn*)

2294-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. Kal Group (Respondent) (*Granted*)

2321-88-G: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Novel Masonry Ltd. (Respondent) (*Granted*)

2356-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cornwall Gravel Company Ltd. (Respondent) (*Withdrawn*)

2378-88-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)

2390-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Condor Electrical Co. Ltd. (Respondent) (*Withdrawn*)

2391-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electrical Services Ltd. (Respondent) (*Granted*)

2396-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Chorus Decor (Respondent) (*Withdrawn*)

2398-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. IGC Construction (Respondent) (*Withdrawn*)

2399-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Snob Fashions Ltd. (Respondent) (*Withdrawn*)

2401-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. M G B Inc. (Respondent) (*Withdrawn*)

2402-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mastrantoni Construction (Respondent) (*Withdrawn*)

2403-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. The Foundation Co. of Canada Ltd. (Respondent) (*Withdrawn*)

2404-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Silverwood Enterprises (Respondent) (*Withdrawn*)

2406-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Imperial Caulking (Respondent) (*Withdrawn*)

2407-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mississauga Construction 786713 Ontario Ltd. (Respondent) (*Withdrawn*)

2433-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Macon Drywall Systems (Respondent) (*Withdrawn*)

2447-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Di Marco Plumbing & Heating Co. Ltd. (Respondent) (*Granted*)

2448-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. UMACS Construction Co. Ltd. (Respondent) (*Withdrawn*)

2449-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Inc. (Respondent) (*Withdrawn*)

2469-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Kaneff Properties Ltd. (Respondent) (*Withdrawn*)

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Unit #1: "all employers of employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same for whom the International Union of Operating Engineers, Local 793 has bargaining rights as at November 7, 1986 in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers for whose employees the International Union of Operating Engineers, Local 793 may after November 7, 1986, obtain bargaining rights through certification or voluntary recognition in the sectors and geographic area just described"

Unit #2: "all employers of truck drivers for whom the International Brotherhood of Teamsters Union, Local 91 has bargaining rights as at November 7, 1986, in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and, in accordance with the provisions of subsection 127(2) of the *Labour Relations Act*, for such other employers for whose employees the International Brotherhood of Teamsters Union, Local 91 may after November 7, 1986, obtain bargaining rights through certification or voluntary recognition in the sectors and geographic area just described"

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ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1989



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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1989] OLRB REP. MARCH

EDITOR: COLLEEN EDWARDS

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GOLDCREST FURNITURE LTD.; RE U.S.W.A.; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS, LOCAL 847 AFFILIATED WITH THE TEAMSTERS UNION; RE GROUP OF EMPLOYEES 245

Practice and Procedure - Certification - Timeliness - Objectors requesting an extension of the terminal date - Board does not extend the terminal date lightly - Three full days was sufficient notice to allow employees to object to the certification - Certificate issuing

CAREY'S RESTAURANTS (DUNDAS) INC.; RE H.E.R.E, LOCAL 75; RE GROUP OF EMPLOYEES 233

Practice and Procedure - Change in Working Conditions - Discharge - Evidence - Interference in Trade Unions - Remedies - Unfair Labour Practice - Board taking into account findings of fact made by another panel with respect to issues put squarely before that panel in another proceeding involving the same parties - Respondent employer not appearing at hearing and therefore failing to discharge burden of proof - Multiple breaches of Act - Respondent not providing conduct money to witnesses it had summonsed and who had attended - Employer's actions may constitute unfair labour practice but Board has other means of enforcing the payment of conduct money - Board ordering that conduct money be paid and posting - Board declining to award costs

HAMILTON AUTOMATIC VENDING COMPANY LIMITED; RE CEMENT, LIME, GYPSUM AND ALLIED WORKERS DIVISION OF THE B.B.F. AND ITS LOCAL 576 248

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jurisdiction and failed to observe the rules of natural justice in refusing to inquire into the complaint - Judicial review dismissed by Divisional Court

DELLBROOK HOMES, THE TORONTO HOUSING LABOUR BUREAU, PHIL-MOR DEVELOPMENTS LIMITED, MOR-ALICE CONSTRUCTION LIMITED, GREENPARK HOMES, HERON HOMES, BRAMALEA LIMITED, VICTORIA WOOD DEVELOPMENT CORPORATION INC., TWO STAR CONSTRUCTION LTD., MICHAEL REILLY, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... 315

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U-NEED-A CAB LIMITED; RE R.W.D.S.U., AFL:CIO:CLC:..... 301

Pre-Hearing Vote - Certification - Practice and Procedure - Respondent refusing to post notices for employees and to provide requisite lists of employees - Respondent taking position that the application was untimely by reason of the alleged existence of a collective agreement - Persons interfering with Board instructions may be liable to punishment for contempt - Officer directed to meet with parties

GOLDCREST FURNITURE LTD.; RE U.S.W.A.; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS, LOCAL 847 AFFILIATED WITH THE TEAMSTERS UNION; RE GROUP OF EMPLOYEES 245

Reconsideration - Bargaining Unit - Certification - Construction Industry - Request that Board reconsider its interpretation of the MTABA collective agreement and its decision to allow the Carpenters Union to carve out its craft from the concrete forming agreement - Reconsideration dismissed

ELLIS-DON LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE THE FORM WORK COUNCIL OF ONTARIO; RE METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; RE MILNE & NICHOLLS LTD.; RE MOLLENHAUER LIMITED 234

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X

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Unfair Labour Practice - Duty of Fair Representation - Failure to pursue grievances to arbitration not breach of fair representation duty -Board not deciding issue of whether union’s refusal to give the complainant a copy of the grievance filed on his behalf amounted to a breach of the Act - No remedy would have been granted in any event -Complaint dismissed

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DELLBROOK HOMES, THE TORONTO HOUSING LABOUR BUREAU, PHILMOR DEVELOPMENTS LIMITED, MOR-ALICE CONSTRUCTION LIMITED, GREENPARK HOMES, HERON HOMES, BRAMALEA LIMITED, VICTORIA WOOD DEVELOPMENT CORPORATION INC., TWO STAR CONSTRUCTION LTD., MICHAEL REILLY, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... 315

2803-88-R Hotel Employees Restaurant Employees Union Local 75, Applicant v. Carey's Restaurants (Dundas) Inc., Respondent v. Group of Employees, Objectors

Certification - Practice and Procedure - Timeliness - Objectors requesting an extension of the terminal date - Board does not extend the terminal date lightly - Three full days was sufficient notice to allow employees to object to the certification - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *Rich Frechette, Stan Urbain and Roy Whiley* for the applicant; *Cathy Bishop* for the respondent; *Carol Drummond, Mike Otonichar, Susan Clements and Tammie Tucker* for the objectors.

DECISION OF THE BOARD; March 16, 1989

1. The name of the respondent is amended to read: "Carey's Restaurants (Dundas) Inc."
2. This is an application for certification in which the parties met with a Labour Relations Officer on the day scheduled for hearing of this matter, reached agreement on all matters in dispute between them, except with regards to the matter of the petition set out below, and further agreed to waive their right to a formal hearing on the agreed matters.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at 120 King Street West, Dundas, Ontario, save and except supervisors, those above the rank of supervisor, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 22, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. On the date set for hearing, March 3, 1989, a document entitled "Petition Against the Unionization of Carey's Restaurant Inc." was filed with the Labour Relations Officer during discussions with the parties. The terminal date in this matter was February 22, 1989. Thus the petition is not timely and cannot be accepted unless the terminal date were to be extended. If the petition were accepted, it would not be relied upon to cast doubt on the majority membership evidence filed by the union unless it were proven voluntary, i.e. it would have to be shown that the petition was started and circulated without any actual or perceived participation by members of management. The Board first heard the parties' submissions on why it should accept the petition late. The petitioners' request for the acceptance of the petition was interpreted by the Board as a request for an extension of the terminal date.
7. The Board was informed that the employer posted three copies of Form 6 at the workplace on the morning of Monday, February 20, 1989. This allowed three full days before the end of the terminal date in which the employees could have expressed their opposition to the union. Ms.

Drummond, who spoke on behalf of the petitioners did not see the notice until the following morning. Ms. Bishop, who spoke on behalf of the company, said that staff was light on Monday and many employees would not have seen it that day. None of the signatures on the petition of people agreed to be in the bargaining unit were obtained until February 23, 1989, and some were not obtained until February 28, 1989.

8. The Board ruled orally at the hearing that it was not prepared to extend the terminal date in this matter as three full days was sufficient notice to allow employees to object to the certification. Thus, it was not necessary to inquire into the voluntariness of the petition. We confirm that ruling, noting the small size of the bargaining unit, numbering twenty-seven in total, and the absence of any special circumstances put before the Board. The Board does not extend the terminal date lightly. In *Breithaupt Leather Company Limited* [1966] OLRB Rep. Dec. 734 it was said that it only does so in "extraordinary circumstances". Less than three full days has been considered sufficient notice in *MacDonnell Memorial Hospital* [1979] OLRB Rep. Oct. 996 (2 1/2 days) where the Board said that three days notice had consistently been held to be sufficient and in *Lanark Mills Ltd.* (2 days).

9. A certificate will issue to the applicant.

3291-86-R; 3457-86-R; 0250-87-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Ellis-Don Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. The Form Work Council of Ontario, Intervener #2 v. Metropolitan Toronto Apartment Builders Association, Intervener #3; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Milne & Nicholls Ltd.**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Mollenhauer Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2

Bargaining Unit - Certification - Construction Industry -Reconsideration - Request that Board reconsider its interpretation of the MTABA collective agreement and its decision to allow the Carpenters Union to carve out its craft from the concrete forming agreement -Reconsideration dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members D. A. MacDonald and P. Grasso.

DECISION OF THE BOARD; March 7, 1989

1. The Board has received three requests that it reconsider its decision dated December 8, 1988 (since reported at [1988] OLRB Rep. Dec. 1254 and hereinafter referred to as the "Decision") in these applications.

2. The basis of the request by the Labourers' International Union of North America, Local 183 ("Local 183") and the Form Work Council of Ontario (the "FWCO"), made by letter dated January 24, 1989, can be summarized as follows:

- (a) that the Board erred in law and thereby misinterpreted the collective agreement between the Metropolitan Toronto Apartment Builders Association ("MTABA") and Local 183 dated May 9, 1985 (the "MTABA Agreement") and the collective agreement between Ellis-Don Limited and Local 183 dated August 22, 1985 (the "Ellis-Don Agreement") by finding that they contained no relevant patent or latent ambiguity;
- (b) that the Board erred in permitting the applicant United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27") to carve out its craft (that is, carpenters and carpenters' apprentices) from the bargaining unit covered by the collective agreement between Ellis-Don Limited and the FWCO dated August 22, 1985 (the "Ellis-Don Form Work Style Agreement").

3. By letter dated February 15, 1989, the MTABA "concurs with Local 183's [sic] submissions and on its own behalf requests the Board to reconsider the Decision" on the basis that the Board erred in its determination of three issues; namely, (1) the admissibility of extrinsic evidence related to the evolution of residential high-rise construction, bargaining history in the industry and practices under the collective agreements made between Local 183 and the MTABA; (2) the representational nature of the rights created by the collective agreements between Local 183 and the MTABA from 1970 to the present; and (3) the relevance of previous decisions of the Board interpreting other collective agreements between Local 183 and the MTABA and Local 183 and the Toronto Housing Labour Bureau. In the result, asserts the MTABA, the Board misconstrued the MTABA Agreement.

4. The respondents, together, by letter dated February 16, 1989, also "concur" with the submissions of Local 183 and the FWCO, and make their own submissions which, in effect, supplement those of Local 183 and the FWCO. The respondent Ellis-Don Limited also submits that the Board ought to reconsider its decision to permit Local 27 to carve out its craft from the Ellis-Don Form Work Style Agreement on the merits, or, failing that, that the parties have not had a fair opportunity to address that issue and should be given one.

5. Section 106(1) of the *Labour Relations Act* provides:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The Board's power to reconsider its decisions is a broad one. However, both the Act and the realities of labour relations dictate that the premise from which the Board must operate is that its decisions should be final and conclusive. The Board's approach to request for reconsideration is accurately summarized in Board Practice Note No. 17 (see also *Capital Construction Corporation*, [1988] OLRB Rep. Aug. 747; *Northern and Central Gas Corporation Limited*, [1988] OLRB Rep. Jan. 70; *The London Soap Company Limited*, [1987] OLRB Rep. Feb. 241). In recognition of the need for finality, the Board will not usually reconsider a decision unless an obvious error has been made; or, the request raises important issues of Board policy which have not been addressed adequately or at all; or, the party requesting it proposes to adduce evidence which it could not, with the exercise of due diligence, have obtained previously, and which new evidence would be virtually conclusive; or, if a party wishes to make representations it had no previous opportunity to make.

The Board's approach to request for reconsideration is a stringent one. A less stringent approach would create uncertainty and tend to have a negative impact on the labour relations of this province.

6. It is asserted that the Board gave no reasons for rejecting the argument that the MTABA and Ellis-Don Agreements contained a patent ambiguity. Assuming, without finding, that section 17 of the *Statutory Powers Procedure Act* applies to the Decision, we observe that the Board's reasons in that respect are found in paragraphs 18 to 20 of the Decision (which paragraphs must be read together with paragraphs 8, 16 and 17). We find no conflict between Article 1.01 of the MTABA Agreement and Article A.6.1 of Schedule "A" to the MTABA Agreement. Those two provisions must and can be read together in the manner set out in paragraphs 8, 19 and 20 of the Decision.

7. In that regard, the request for reconsideration challenged the Board's observation, in paragraph 30 of the Decision, that the decision in *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305 "... has not been challenged either in these proceedings or elsewhere". That statement was intended to refer to the Board's findings in *Runnymede*, *supra*, with respect to the Housing Bureau Agreement between Local 183 and the Toronto Housing Labour Bureau which has been called the "low rise MTABA Agreement". However, The Board in *Runnymede* did have occasion to consider the MTABA Agreement because of the cross-over provision in Article 1.02 of the Housing Bureau Agreement and it should be evident, from paragraphs 5 and 6 of the Decision, that the Board recognized that those parts of the *Runnymede*, *supra*, decision which found or suggested that the MTABA Agreement does not cover carpenters and carpenters' apprentices were being challenged in this proceeding.

8. It is suggested that the Board misinterpreted the agreement between the MTABA and the Toronto Building and Construction Trades Council (Residential Division) by finding, in paragraph 23, that its general structure and intent was "to provide a mechanism by which various trade unions, including Local 183, could obtain bargaining rights for those employees of members of the MTABA who are members of their trade, and not as a means by which Local 183 could obtain bargaining rights for all employees of such companies regardless of their trade". It is true that there is a significant sub-contracting component to this Building Trade Council Agreement. However, having regard to the agreement as a whole, and particularly Articles 1.03, 3.01, 3.02, the September 20, 1969 addendum, and the various Memoranda of Agreement appended to it, it is evident that it was precisely what the Board has found it to be. While Local 183 is the only trade union mentioned by name in the body of the agreement, it is evident that other trade unions could also obtain bargaining rights (though not necessarily bargaining rights identical to those which Local 183 could obtain) under it. In any event, Local 183 never did obtain bargaining rights under Article 3.02. Instead, it negotiated the MTABA Agreement directly with the MTABA.

9. While it should not be, it appears to be necessary to point out that it is neither necessary nor appropriate to recite all of the evidence and representations made to the Board, or to review all of the thought processes which went into considering them, in a decision of the Board. In this case, whether it is specifically referred to in the Decision or not, the Board gave careful consideration to *all* of the evidence before it and to all of the representations of the parties.

10. In that regard, it should be evident, from paragraphs 15, 18 and 22 to 34 of the Decision, that the Board considered the evidence and representations with respect to the existence of a patent ambiguity in the MTABA and Ellis-Don Agreements, and finding no relevant one, went on to consider whether the extrinsic evidence (and representations with respect thereto) revealed any latent ambiguity. In that regard, we observe that the terms of a collective agreement are those

which are agreed to when the agreement is negotiated and settled. The terms cannot be given a different meaning merely because the parties to the collective agreement may subsequently agree that it is correct, particularly when they so agree in the context of a dispute with respect to the application of the agreement in which those parties are allied in interest.

11. In considering the evidence before it, the Board gave each piece of documentary and *viva voce* evidence the weight which the Board determined it deserved. In the result, the Board rejected, and now rejects, the characterization given to the evidence in the requests for reconsideration.

12. It is implicit in the Decision that the Board was not persuaded that the extrinsic evidence called by the respondents and interveners established either a latent ambiguity in, or that carpenters and carpenters' apprentices are covered by, the MTABA and Ellis-Don Agreements. It was evident from the testimony of all of the witnesses that their knowledge, both direct and indirect, and their recollection of material matters was incomplete. The Board also found these witnesses, albeit in varying degrees, unable to entirely resist the influence of self-interest and that their testimony was coloured thereby. Further, taken as a whole, the testimony of these witnesses tended to be equivocal and inconsistent, both with the *viva voce* evidence of other witnesses and with the documentary evidence before the Board.

13. These shortcomings were most evident in the quite bald assertion, made in various forms, that "construction labourers" really means "direct employees" of MTABA builders and Ellis-Don. There is no documentary or cogent *viva voce* evidence to support that proposition. On the contrary, for example, Harold Green, who testified on behalf of the MTABA, said that the first MTABA Agreement was intended to cover to be normal functions of *labourers* and others on site according to the "*Labourers yellow book*" (which Michael Reilly, who was, at all material times, a representative of either Local 183 or the Labourers' International Union of North America, Ontario Provincial District Council, testified he knew nothing about). Mr. Green also testified that the different wage rates in the MTABA Agreement were intended to recognize that some construction labourers are more sophisticated (viz. skilled), and therefore valued more highly, than others.

14. There was no documentary or cogent *viva voce* evidence to support the peculiar and, in our view, strained definition of the term "construction labourers" (see paragraph 17 of the Decision) which many of the witnesses, particularly Mr. Reilly, wanted the Board to accept. In that regard, it was suggested that the change, in the agreement dated September 20, 1969, between the MTABA and the Toronto Building Construction Trades Council, from the term "their employees" to the term "their labourers" (see paragraph 22 of the Decision) meant nothing. Having regard to the rather fundamental nature of the change and the reason it was made, the Board found, and still finds, that suggestion to be rather disingenuous. The Board took the same view of Mr. Reilly's explanation that the statement by Local 183 that it was only interested in representing labourers employed by MTABA builders (see paragraph 28 of the Decision) had been made "tongue-in-cheek" and did not mean what it appeared to.

15. Further, much of Mr. Reilly's testimony with respect to material matters was given in response to leading questions by both counsel for Local 183 and the FWCO, whose witness he was, and by the intervener MTABA and the respondents, all of whom are allied in interest with respect to the issues with which the Decision deals. Accordingly, the Board gave his evidence much less weight than it might otherwise have. Even then, Mr. Reilly never unequivocally stated either that carpenters and carpenters' apprentices, or carpentry work per se, is covered by the MTABA or Ellis-Don Agreements, or under the Heavy Engineering Agreement referred to in paragraph 32 of

the Decision. He said only that the MTABA and Ellis-Don Agreements cover work that both the Labourers' International Union of North America and the United Brotherhood of Carpenters and Joiners of America claim is within their respective trade jurisdictions. He did not say, nor could he, that any of the work referred to under either agreement is identified exclusively with carpenters or the carpentry trade. Indeed, he specifically acknowledged that it was not so identified in any sector (including the industrial, commercial and institutional sector) of the construction industry.

16. The extrinsic evidence also reveals (in addition to what is set out in paragraphs 19, 27 and 34 of the Decision) that in negotiations with respect to Article A.6.1 in Schedule "A" to the MTABA and Ellis-Don Agreements, the list of classifications found there was prepared by, and inserted at the instance of, Local 183. It also reveals that the MTABA refused to include other classifications which Local 183 wanted listed, like, for example, "welders", although "Welders Helpers" are included.

17. In their requests for reconsideration, the interveners and respondents take issue with the Board's comments (in paragraphs 19 and 31 of the Decision) with respect to Article 1.05 of the MTABA Agreement. The Board found it curious that a collective agreement which the respondents and interveners submitted covers concrete forming work, and which contains a classification for "Form Erectors and Setters", would contain a provision stipulating, as Article 1.05 does, that the employer is bound by the agreement recognized that Local 183 "represents and bargains for its members in various other sectors of the construction industry not covered by this agreement, such as concrete forming ...". However, the Board considered that to be a relatively minor point which made no difference to the Board's conclusions with respect to the scope of the MTABA Agreement. Further, and contrary to what is suggested in their request for reconsideration, the *viva voce* evidence, particularly that of Mr. Reilly, establishes no more than, as pointed out in paragraph 31 of the Decision, that "flat" concrete forming work was done under the MTABA Agreement. Nor is the interveners' and respondents' assertion that the concrete forming of superstructures in the residential sector is covered by the MTABA Agreement supported by the evidence. Mr. Reilly testified that there is no classification in the MTABA Agreement which covers concrete forming work on superstructures. In addition to what is set out in the Decision in that respect, we note, first that, the omission of a classification for work which is allegedly covered by and done under a collective agreement is a rather significant one. Such a fundamental omission, for which no satisfactory explanation was offered, suggest that such work is not in fact covered. Second, the words of Article 1.05 stipulate that another "appropriate applicable collective agreement", not just a wage rate under the MTABA Agreement, will be negotiated to cover those direct employees of MTABA builders who do concrete forming work.

18. The evidence before the Board does not establish that the concrete forming of superstructures in the residential sector of the construction industry was either contemplated by, or in fact done under, the MTABA or Ellis-Don Agreements. In addition to the comments the Board has made both herein and in the Decision in that respect, we note that Mr. Reilly testified that it was rare (he gave no examples at all) for an MTABA builder to do any concrete forming work on superstructures work using direct employees. It was also evident that any such work which was done, was done at a wage rate found, not in the MTABA Agreement, but in the Form Work Council Agreement (or the Ellis-Don Form Work Style Agreement). This also suggests that such concrete forming work of superstructures is done under the Form Work Council Agreement or Ellis-Don Form Work Style Agreement, not under the MTABA or Ellis-Don Agreements and also helps explain the apparent ambiguity in Article 1.05 of the MTABA and Ellis-Don Agreements.

19. Taken as a whole, the evidence before the Board, including the extrinsic evidence, falls

far short of establishing any relevant ambiguity in the MTABA or Ellis-Don Agreements, or that carpenters and carpenters' apprentices are covered thereby.

20. In paragraph 13 of their request for reconsideration, Local 183 and the FWCO request leave to file evidence in the form of Minutes of Settlement relating to the reinstatement of the exclusion for operating engineers in Article A.6.1. of the 1987-89 MTABA agreement referred to in paragraph 19 of the Decision. That deletion was significant because of what it illustrated about the state of the minds of Local 183 and the MTABA. In our view, the evidence which Local 183 and the FWCO seek to adduce would not be "virtually conclusive" with respect to the issues with which the Decision deals. Indeed, the fact that the exclusion has been reincorporated at the instance of a third party is unlikely to have any significant impact at all. Accordingly, leave is denied. In that regard, the Board did not, as the respondents suggest, give *no* meaning to the exclusionary words. The Board did not disregard the words but found that the exclusion added nothing more than greater certainty with respect to the exclusion of operating engineers from the collective agreement. By definition, words which do nothing more than add certainty tend to be "redundant" in the sense of being superfluous and capable of being omitted without loss of meaning or significance.

21. With respect to the craft carve out issue, the request for reconsideration by Local 183 and the FWCO states:

16. In our respectful submission, the Board erred in failing to follow its displacement policy as exemplified by the decision in *Duron Ottawa Ltd.*, [1983] OLRB Rep. Oct. 1639 to construction industry applications for certification made under Section 144(3) of the Act. In our respectful view, *Duron Ottawa*, is not "... inconsistent with the authorities including the *Duron Ontario Limited* decision to which it refers..." (at para. 41) but rather is consistent with *Duron Ontario Limited* and with the Board's decisions in *Crown Electric*, [1982] OLRB Rep. May 660 and *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166, (referred to in para. 45 of the Decision) which, by inference, the Board must also reject on this point. While we recognize that there are contrary rulings in certain of the cases referred to in para. 41 of the Decision, it is our submission that the factual circumstances in those cases are distinguishable from the facts of these proceedings and that those cases do not represent the general policy by the Board to craft severance considerations. Rather, those decisions represent exceptions to the general rule or policy that the bargaining unit in the incumbent [sic] union's collective agreement is appropriate in displacement cases, including in the construction industry, and are based on the factual circumstances which obtained in those cases. A succinct statement of the principle is found at p. 661 of *Crown Electric* wherein the Board recognises "...the Board's long-standing policy that, where an applicant seeks to displace an incumbent [sic] bargaining agent and where a collective agreement is in force, the appropriate bargaining unit is the unit described in the collective agreement between the employer and the incumbent."

The MTABA and the respondents have adopted this submission.

22. In *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734 (which was decided prior to the enactment of the construction industry province-wide bargaining provisions, including section 144, of the Act), the Board observed that its approach to applications for certification relating to the construction industry was to determine bargaining units pursuant to section 6(2) of the Act where a trade union which satisfies the conditions of section 6(2) requests a (its) craft bargaining unit. Otherwise, the bargaining unit was determined under section 6(1). Consequently, when a non-craft trade union applied to represent employees in an existing bargaining unit, the Board determined the appropriate bargaining unit under section 6(1), and, as a matter of policy, generally found that appropriate unit to be the existing one. *Duron Ontario Limited*, *supra*, did not suggest that a trade union which satisfies the conditions of section 6(2), as Local 27 clearly does, and applies to represent a (its) craft unit of employees, could not carve out such a bargaining unit from a broader existing one. It was only to the extent, if it does so at all, that *Duron Ottawa Ltd.*, [1983]

OLRB Oct. 1639 suggests otherwise that the Board found it (in paragraph 41 of the Decision) to be inconsistent with the earlier authorities and Board practice. We note that *Duron Ottawa Ltd.*, *supra*; *Crown Electric*, [1982] OLRB Rep. May 660, and *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166 all involved, as the Board points out in paragraph 45 of the Decision, applications under section 144(1) of the Act in which a craft carve out from an existing bargaining unit was found to be appropriate. We find ourselves constrained to observe that the passage from *Crown Electric*, *supra*, quoted in the request for reconsideration by Local 183 and the FWCO, has been taken out of context by them. Viewed in context, that passage forms part of the Board's recitation of the positions taken by the parties in that case. It was the respondent employer and the incumbent trade union who were asserting, unsuccessfully in the result, that that was the Board's long-standing policy. Except to the limited extent specified in the Decision with respect to *Duron Ottawa Ltd.*, *supra*, the Board did not reject the analysis or conclusions reached in *Duron Ottawa Ltd.*, *supra*; *Crown Electric*, *supra*, or *Aero Block and Precast Ltd.*, *supra*. On the contrary, it extended and applied them to the issues before it and concluded that it was appropriate to permit a craft carve out in Board File No. 3291-88-R (the only one in which it remained an issue).

23. With respect to the submissions of the respondents on the craft carve out question, it was clear throughout the proceedings one of the issues in the phase of the proceedings with which the Decision deals was the description of the bargaining unit in each application. There was, at least potentially, a craft carve out issue in all three applications. Indeed, once the applicant conceded that carpenters and carpenters' apprentices were covered by the Ellis-Don Form Work Style Agreement, it was clear that the appropriateness of permitting a craft unit carve out was clearly an issue in the Ellis-Don Limited application (Board File No. 3291-88-R), which, as it turned out, was the only application in which it was necessary for the Board to deal with the issue. We note that the craft carve out issue in that application is not different in substance from the craft carve out issue in the other two applications. In our view, the parties have had a full and fair opportunity to address themselves to the question of craft carve out in all three applications. The fact that it was agreed that there were no employees covered by the Ellis-Don Form Work Style Agreement on the date of application, a question arises only after the appropriate bargaining unit has been determined, only makes that application easier to dispose of since no run off representation vote between the FWCO and the applicant is necessary. (We also observe that that agreed fact does not, by itself, lead to the conclusion that Ellis-Don employed no carpenters or carpenters' apprentices that day.)

24. Finally, there is nothing new in any of the substantive submissions made in the request for reconsideration. All of them were made, in one form or another, at the hearing. These applications did raise significant and important policy issues in the phase of the proceedings with which the Decision deals. The parties had an opportunity to argue these at the hearing and it should be evident from the Decision that the Board considered them. In the final analysis, what the respondents and the interveners seek amounts to no more than an opportunity to re-argue the case. The Board finds that there is no cogent reason to give them that opportunity or to reconsider its decision. All of the requests for reconsideration are therefore dismissed.

25. However, the Board hereby amends the Decision as follows:

- (a) the words "Form Work Council Agreement" in the line 9 of paragraph 6 are deleted and the words "Ellis-Don Form Work Style Agreement" are substituted therefor;
- (b) the words "and exclusively" are inserted into line 8 of that part of

paragraph 20 found on page 16 between the words “specifically” and “suggestive”;

- (c) the word “unequivocal” is inserted into line 19 of paragraph 32 between the words “no” and “suggestion”;
- (d) the bracket before the word “trenches” in line 27 of the paragraph 32 is deleted and a bracket is inserted before the word “in” at the end of line 26 of paragraph 32;
- (e) the word “is” is inserted after the word “Ontario” and before the comma following thereafter in line 9 of that part of paragraph 37 on page 27;
- (f) the word “is” is deleted from the end of line 14 of that part of paragraph 37 on page 27 and the words “one which covers” are substituted therefor;
- (g) the word “union” in the fourth line after the quote (in paragraph 41) on page 33 is deleted and the word “unit” is substituted therefor.

The Board’s Decision dated December 8, 1988 in this matter is otherwise affirmed.

2358-88-R Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, Applicant v. **The Corporation of the City of Gloucester**, Respondent v. Association of Municipal Employees, Intervener #1 v. Canadian Union of Public Employees, Intervener #2

Certification - Trade Union - Trade Union Status - Applicant’s membership cards in English and French - Neither English nor French name that under which the applicant made this application - Board discussing the effect of s.105 of the Act - Applicant adducing documentary and oral evidence to show that it was the organization which had been found to be a trade union in an earlier proceeding - Applicant found to be a trade union

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

DECISION OF THE BOARD; March 28, 1989

1. By decision dated February 3, 1989, the Board directed the taking of pre-hearing representation votes in this application for certification. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 70(2) of the Board’s Rules of Procedure.

2. The style of cause is amended to show the applicant’s name as “Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91”.

3. The February 3rd decision indicated that the applicant had not been found in any previ-

ous proceeding to be a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"). The parties addressed this issue at a hearing held after the vote had been taken.

4. Under section 105 of the Act, an organization of employees may benefit in subsequent proceedings from the Board's initial finding that it is a trade union within the meaning of clause 1(1)(p) of the Act. That finding serves as *prima facie* evidence that the organization is a trade union. Thus a trade union normally does not have to provide evidence that it *is* a trade union every time it makes an application. Because of the reliance on the initial finding, however, the Board must be satisfied that the organization making the subsequent application(s) is the same organization which was found to be a trade union. Any deviation in the name under which the organization applies in subsequent applications from that under which it applied in the proceeding in which it was found to be a trade union may raise doubts about whether it is in fact the same organization. The name must be exactly the same.

5. The applicant in this case applied under the name "Teamsters, Chauffeurs, Warehousemen and Helpers Local 91", now amended to insert a comma after "Helpers". In a letter dated January 11, 1989, the Registrar informed the parties that the applicant had not been found in any previous proceeding to be a trade union within the meaning of clause 1(1)(p) of the Act. (That information was also indicated on the Form 7 "Notice to Employees of Application and Request for Pre-hearing Vote" which was posted in the workplace). The Registrar's letter continued:

Our status records indicate that an organization with the similar name of Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 91, affiliated with the International Brotherhood of Teamsters of America, was found to be a trade union in Board File #11896-66-R. Your attention is drawn to the following excerpt from *Hartley Gibson Company Limited*, [1986] O.L.R.B. Rep. Nov. 1517: "Section 105 of the *Labour Relations Act* sets up a rebuttable evidentiary presumption of trade union status for organizations that the Board has previously found to be a trade union. Because of the nature of that provision, an applicant in certification proceedings is not entitled to the benefit thereof unless its name is *identical* to that which the Board has previously found to be a trade union. Even a relatively minor difference in name may reflect that an applicant with a name "similar to" or even "substantially the same as" that of an organization previously found to be a trade union is either an entirely different entity or that it has undergone some change which may result in it being a trade union no longer."

If our information is correct, you must be prepared to satisfy the Board in accordance with its usual practice that your organization is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

Please file this information with the Board on or before the terminal date set for this application.

[emphasis in original]

The letter concludes that the applicant may correct the information in writing by advising the Registrar or Deputy Registrar "of the file number of the Board proceeding in which the applicant under *this exact name* has been found to be a trade union" (emphasis on original). No correction was made here.

6. The Registrar's letter clearly and concisely indicates the reason why the names must be the same and puts the applicant on notice that it must satisfy the Board that it is a trade union.

7. The applicant in this case adduced documentary and oral evidence to show that it is the organization which has been found to be a trade union by the Board under the name "Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 91, affiliated with the International Brotherhood of Teamsters of America" and that it is a trade union with the meaning of clause 1(1)(p) of

the Act. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers chartered certain persons and their successors as "Local Union No. 91", originally August 1, 1961. The applicant also filed its international constitution and its local by-laws which show one of the purposes of the international and the local to be "to secure improved wages, hours, working conditions and other economic advantages through organization, negotiations and collective bargaining". The cover of the by-laws reads as follows: "By-laws of the Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91 [over a crest] Affiliated With The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [under the crest]"; section 1 states that the organization's name is "Teamsters Local Union No. 91". As Robert Kelly, the applicant's President, explained, the applicant had sent amendments to the International; these had been approved but the International suggested some additional amendments, including one to the applicant's name. The membership of the applicant approved the amendment, according to the undisputed evidence of Mr. Kelly and it is inserted, along with other amendments at the front of the by-laws under the heading "Bylaw Corrections Inserts". The name is changed to "Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91". Apart from the comma, this is the name under which the applicant applied for certification in this case. We are satisfied the omission of the comma was inadvertent and therefore amended the style of cause to add the comma to the applicant's name. Mr. Kelly also testified that the applicant has a membership of 2700 individuals and has negotiated collective agreements in all but the most recent certifications.

8. The applicant also filed several certificates which it had recently been issued by the Board. On January 21, 1987, it was issued a certificate in the name "Teamsters Union Local 91 Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America"; on September 21, 1987 and on December 9, 1988, it was issued certificates in the name of "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America". On February 23, 1989, it was issued two certificates in the name of "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91", the name under which it applied in this case. The decision issuing those last certificates contains the Board's usual statement: "The Board finds that the applicant is a trade union with the meaning of section 1(1)(p) of the *Labour Relations Act*". Although counsel for the applicant referred specifically to the date of that decision, he did not suggest that it should constitute the basis of the application of section 105 of the Act. Given the Registrar's letter and the fact that the February 23rd decision did not deal with this matter except in the usual form, we would not be satisfied to rely on that decision as a precondition for applying section 105 of the Act.

9. The membership cards filed by the applicant in this case are in English and in French. The name of the organization is different in English and in French - and neither name is that under which the applicant has made this application. On the English language side of the application, the individual applies for membership in the "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91"; on the French language side of the application, the individual indicates he or she wishes to become a member of the "Teamsters Union Locale 91 affili     la Fraternite Internationale des Teamsters, Chauffeurs, Hommes d'Entrepots et Aides d'Amerique".

10. We have detailed the evidence in this matter because it illustrates a not uncommon aspect of the application of section 105 and clause 1(1)(p) of the Act: put simply, some organizations are careless about ensuring they apply in subsequent applications in exactly the same name as the name under which they were found to be a trade union. Yet they seek the benefit of section 105 of the Act. That benefit, however, has a price, albeit, in our view, a not particularly onerous one: the organization must make the effort to use the name under which it has been found to be a

trade union exactly and consistently. Failure to do so runs the risk at least of having to prove trade union status each time it makes an application or whenever it applies under a slightly different name and possibly, of delay, extending of the terminal date or even dismissal of the application.

11. In *Hartley Gibson, supra*, there had been a merger. That is not the case here. No party alleged that the applicant was a different organization than the one which had been found to be a trade union in Board File No. 11896-66-R. Rather they emphasized the confusion that can result from the use of different names. In *Hartley Gibson, supra*, there was also a discrepancy between the name used in the application and that used on the applications for membership: a full name was used on the cards, while an acronym was used on the application and therefore on Form 7 and on the Form 69, "Notice of Taking of Vote". As in our case, there was "no allegation of actual confusion or objection with respect to this discrepancy... by any party with an interest in the proceedings and the evidence before us demonstrates that the variations in nomenclature creates no real basis for expecting that there was any confusion amongst the employees as to what they were joining or voting for".

12. We advised the parties orally that we were satisfied that the applicant in this application is the same organization which was found to be a trade union in Board File No. 11896-66-R. We are further satisfied that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

13. We also advised the applicant that it had to stop making applications under a variety of names and that it might well be put to strictly proving its status in future applications should there be any discrepancy between the name in which it has been found to be a trade union in this proceeding and the name in which it applies in future applications.

14. Counsel for the applicant advised us that "Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91" is the proper name of the applicant and would be the name under which it would file future applications. Its applications for membership will be changed to reflect that name.

15. The Board therefore finds that the applicant "Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91", is a trade union within the meaning of clause 1(1)(p) of the Act.

16. The Board's February 3rd decision directed the taking of pre-hearing representation votes in two voting constituencies because certain of the employees for whom the applicant sought certification were represented by an incumbent bargaining agent, while other employees had been represented by a bargaining agent which had abandoned its bargaining rights.

17. On the taking of the pre-hearing representation vote in voting constituency #1, not more than fifty per cent of the ballots cast were in favour of the applicant.

18. The application is therefore dismissed with respect to voting constituency #1.

19. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in voting constituency #1 within the period of six months from the date hereof.

20. The parties agreed to the appropriate bargaining unit with respect to the employees in voting constituency #2. Having regard to that agreement, the Board finds that

all employees of the respondent in the City of Gloucester, save and except forepersons and those above the rank of forepersons, casual staff, alder-

manic assistants and persons in bargaining units for which any trade union held bargaining rights as of December 22, 1988,

constitute a unit of employees of the respondent appropriate for collective bargaining. The exclusion of "casual employees" reflects the fact that the collective agreement covering the employees in issue referred to "all permanent hourly employees"; the change in language makes the description more consistent with the Board's usual "all employee" description while recognizing that non-permanent or casual employees had not been included in the unit for which the applicant sought certification when it had been represented by the previous incumbent. The applicant had not sought to include those employees even after the incumbent abandoned its bargaining rights.

21. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit described in paragraph 20 above were members of the applicant at the time the applicant was made.

22. On the taking of the pre-hearing representation vote in voting constituency #2, more than fifty per cent of the ballots cast were in favour of the applicant.

23. Accordingly, a certificate shall issue to the applicant with respect to the employees in the bargaining unit described in paragraph 20 above.

24. The Registrar will destroy the ballots cast in the pre-hearing representation votes taken in voting constituency #1 and in voting constituency #2 following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

2963-88-R United Steelworkers of America, Applicant v. Goldcrest Furniture Ltd., Respondent v. Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervener #1 v. Group of Employees, Intervener #2

Certification - Practice and Procedure - Pre-Hearing Vote - Respondent refusing to post notices for employees and to provide requisite lists of employees - Respondent taking position that the application was untimely by reason of the alleged existence of a collective agreement - Persons interfering with Board instructions may be liable to punishment for contempt - Officer directed to meet with parties

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald*.

DECISION OF THE BOARD; March 20, 1989

1. This is an application for certification in which the applicant requested that a pre-hearing vote be taken. It was filed on February 28, 1989. On March 2, 1989, the Board made the usual order authorizing a Labour Relations Officer ("LRO")

- (1) to confer with the parties as to the description and composition of an appropriate bargaining unit;
- (2) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the Labour Relations Act;
- (3) to confer with the parties as to the description and composition of the voting constituency, the list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number and locations of the polling places;
- (4) upon consent of the parties, to investigate any other matter relating to the application; and
- (5) to report to the Board.

By letter dated March 2, 1989, the Registrar informed the respondent of this application, the Board's order of the same date and the date scheduled for the LRO's meeting with the parties and of its obligations to prepare and file material in connection with the application. Those obligations are as set out in the Form 5 Notice which accompanied the letter, paragraph 7 of which directed that:

You shall prepare and have the following material available on or before the 10th day of March, 1989, for the Examiner whom the Board will appoint in this application:

- (i) A list arranged as in the schedules attached hereto of all employees in the bargaining unit described in the application as at February 28, 1989, the date when the applicant's application was made.
- (ii) **Documents**, from among **existing** employment records containing signatures of the employees whose names appear on the list referred to above, arranged in alphabetical order.

2. By letter dated March 7, 1989, a lawyer acting for the respondent advised the Registrar of its position that this application is untimely by reason of the alleged existence of a collective agreement between it and another union (hereafter referred to as "the incumbent union"). He asserted that the application should either be dismissed without a hearing or made the subject of a hearing on the question of timeliness before any further steps were taken concerning the applicant's request that a pre-hearing vote be conducted. This letter further advised the Registrar that the respondent had not posted the Notices to Employees which it had been directed by the Registrar to post.

3. The LRO appointed for the purposes set out in the Board's decision of March 2, 1989, met with representatives of the applicant, the respondent and the incumbent union on March 14, 1989. The respondent had not by that date complied with paragraph 7 of the Form 5 Notice referred to above. The LRO's report to the Board indicates that the respondent's representative refused to provide the requisite lists of employees and challenged the Board's jurisdiction to entertain this application. It appears from the report that the LRO then adjourned the meeting without completing the tasks assigned in the decision of March 2, 1989, in order to get direction from the Board. It is not clear from the report whether the LRO made a demand to examine the respon-

dent's existing employment records pursuant to the decision of March 2, 1989, nor that any person interfered with any attempt by him to do so.

4. The LRO is directed to reconvene his meeting forthwith on 48 hours' notice to the counsel who appeared at his meeting of March 14, 1989. If the respondent has not by then complied with paragraph 7 of the Form 5 Notice, he is to demand of the respondent access to existing employment records showing who was employed by the respondent on the application date and the terminal date. If he is refused access, he is to draw the respondent's attention to the fact that any person interfering with his carrying out the Board's instructions may be liable to punishment in like manner as if he or she had been guilty of contempt of court: *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, section 13; *Plaza Fiberglas Manufacturing Limited*, [1985] OLRB Rep. Nov. 1648; *Ontario Labour Relations Board v. Plaza Fiberglas Manufacturing Limited*, (1986), 86 CLLC ¶14,031 (Ont. Div. Ct.). If the refusal continues, he is to record the name or names of the individuals who so impede his investigation, together with the information from which it appears that they were acting on the respondent's behalf in so doing.

5. Whatever the outcome of the steps directed in paragraph 4, the LRO is to record in his report the results of his examination of such records as he gains access to in carrying out the instruction in paragraph (2) of the decision of March 2, 1989. He is also to complete his conference with those in attendance on all of the matters referred to in the decision of March 2, 1989, and any other issue which any party says arises in this application. He is to direct the attention of any party who refuses to take or disclose a position on any issue to the Board's decision in *Airline Limousine*, [1988] OLRB Rep. Nov. 1135 at paragraph 6. He is to complete his report in the usual manner.

6. Once the LRO's final report is received, the Board will consider the matters referred to in subsection 9(2) of the *Labour Relations Act*, including the question whether a pre-hearing representation vote should be directed.

7. The respondent would be well advised to review such decisions as *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433, *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589, and *Airline Limousine*, *supra*. It should consider the difference between "jurisdiction" to grant certification after a hearing and "jurisdiction" to entertain and process a certification application. It should understand that the Board's processes cannot function as they should if parties treat the Board's rules and procedures as inapplicable whenever they feel their position will ultimately prevail.

1908-88-U Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and its Local 576, Complainants v. Hamilton Automatic Vending Company Limited, Respondent

Change in Working Conditions - Discharge - Evidence - Interference in Trade Unions - Practice and Procedure - Remedies - Unfair Labour Practice - Board taking into account findings of fact made by another panel with respect to issues put squarely before that panel in another proceeding involving the same parties - Respondent employer not appearing at hearing and therefore failing to discharge burden of proof - Multiple breaches of Act - Respondent not providing conduct money to witnesses it had summonsed and who had attended - Employer's actions may constitute unfair labour practice but Board has other means of enforcing the payment of conduct money - Board ordering that conduct money be paid and posting - Board declining to award costs

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *E. G. Theobald*.

APPEARANCES: *Michael A. Church*, *Felicia Cochrane*, *Joan Gilchrist* and *Denise Mayers* for the complainant; no one for the respondent.

DECISION OF THE VICE-CHAIR, OWEN V. GRAY AND BOARD MEMBER E. G. THEOBALD; March 2, 1989

1. The complainant international union holds bargaining rights for a unit of employees of the respondent. Its Local 576 is involved in the administration of those rights, including collective bargaining and administration of collective agreements. The respondent ("HAVCO") supplies the food to industrial plants by operating food trucks, vending machines, food "stations" and at least one cafeteria. Its major client is Dofasco in Hamilton.

2. The relationship between the applicant and respondent was recently the subject of a comprehensive unfair labour practice complaint in Board File 0577-88-U. Following five days of hearing in October 1988, the Board (differently constituted) on February 8, 1989 released a decision ("the Abella panel decision") finding that the respondent had "bargained in bad faith, undermined, interfered with, discriminated against, and intimidated the union and its members" and had therefore violated sections 15, 64, 66, 67, 70 and 79 of the Act. It determined that there had been "a deliberate campaign of harassment against the union designed to undermine its authority, its members, and the bargaining process". After the respondent's Vice-President, Patricia Sanderson, had been put in charge of its labour relations in 1984, the Board concluded, she had "embarked on a successful campaign to undermine if not eliminate the union" by various means, which included taking an "intractable, technical, unreasonable, and litigious stand on virtually every union request or position". To the extent they are relevant to our understanding and disposition of the complaints before us, the complainants ask that we treat the findings in the Abella panel's decision as fact for the purpose of these proceedings. We accept that we may properly take into account findings of fact made by another panel with respect to issues put squarely before that panel in another proceeding involving the same parties: see *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America, et al.* (1980), 80 CLLC ¶14,017 (Ont. Div. Ct.).

3. This complaint was filed on November 9, 1988. It deals with events which occurred during and immediately following the hearings in Board File 0577-88-U. Notice of the complaint was mailed to the respondent on November 15, 1988. Notice that the hearing of the complaint would take place on February 22 and 23, 1989 was mailed to the respondent on January 23, 1989. By let-

ter dated January 25, 1989, the respondent requested that the hearing be rescheduled to accommodate the vacation plans of the person by whom it wished to be represented at hearing. By letter dated January 31, 1989, the Registrar advised the respondent of the Board's practice that "a party seeking an adjournment of a scheduled hearing must obtain the consent of all parties to the proceeding, otherwise such requests must be made before the panel hearing the case." No one was in attendance on behalf of the respondent on February 22, 1989 at the time and place appointed for hearing, nor after the usual half hour wait.

4. In view of the failure of the respondent corporation to send anyone to the hearing, counsel for the complainant drew our attention to the well known jurisprudence with respect to adjournment of Board proceedings, as set out in such decisions as *Osgood Floor Coverings Limited*, [1983] OLRB Rep. June 936, *R. v. Ontario Labour Relations Board ex parte Nick Masney Hotels Ltd.* [1970], 13 D.L.R. (3d) 289 (Ont. C.A.), and *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* [1979], 24 O.R. (2d) 400 (Ont. Div. Ct.). We note that applicants for a contested adjournment are expected to attend before the hearing panel in person or by representative to argue the application and to answer the kinds of questions which inevitably arise in an application for adjournment of the sort contemplated by the letters sent to the Registrar by the respondent. No one appeared before us to make any application for adjournment. Furthermore, an application based solely on the representations set out in the respondent's letters would have failed. We had no difficulty with the complainant's request that the hearing proceed in the absence of the respondent.

5. It is apparent from the Abella panel's decision and the pleadings in Board File 0577-88-U that one of the major points of contention between the parties was the use by the respondent of persons from an employment agency or agencies to perform "bargaining unit work". The respondent refused to treat these persons as employees covered by the collective agreement it had negotiated with the complainants. Denise Mayers was one such person. An agency referred to in evidence as "Olsten's" sent her to work at HAVCO in about February of 1988. She worked as an attendant at various of the "stations" operated by HAVCO. Other such stations were staffed by persons HAVCO acknowledged to be its employees. She was supervised by a HAVCO supervisor, John Furber. About two weeks after she arrived to work at HAVCO, Mr. Furber asked her to fill in a HAVCO employment application, which she did. She received instructions as to where she was to work and what she was to do either from Mr. Furber or from another HAVCO supervisor, Tim Flaherty. Mr. Furber was responsible for verifying her hours worked. Ms. Mayers was required to and did wear a HAVCO uniform. The work she did was the same as work performed by employees whom HAVCO was prepared to treat as covered by the collective agreement with the complainants. Her paycheque came from Olsten's. Her hourly rate of pay was less than the rate provided which the collective agreement required the respondent to pay its attendants. After she had been working at HAVCO for about six months, Paul Sanderson, HAVCO'S President, came to her work station and introduced himself. He told her she was doing a good job. In about September she started asking for more hours of work. Mr. Furber told her that things were picking up and she would undoubtedly be getting more hours. She also sought a raise in pay. HAVCO told her to speak to Olsten's. Olsten's told her to speak to HAVCO. Neither dealt with her request.

6. On or about October 12, 1988, Ms. Mayers decided to and did become a member of the complainants. HAVCO was at that time refusing to recognize any obligation to deduct union dues from moneys paid for workers supplied by agencies. It would only do so with the written authorization of the worker. Accordingly, the union delivered to HAVCO a document Ms. Mayers signed, authorizing deduction from her pay and remission to the union of union dues. When Ms. Mayers went to Olsten's on about October 21, 1988 to pick up her paycheque, a copy of that dues deduction authorization was on the desk in front of the person to whom she spoke. That Olsten repre-

sentative then said to her, "I think you took the wrong approach; you could have had a long-term relationship with this company." She went to work the following Monday, as usual. Near the end of her shift, a more junior person obtained through the same agency came by her station to say she would be working there the following day. When Ms. Mayers arrived home after work, she received a telephone call from the representative at Olsten's telling her that HAVCO had no further use for her services.

7. It is apparent from the reply filed in this matter that the respondent labours under the illusion that if it obtains workers from an employment agency and has the agency pay those workers their wages, the workers will not be its employees for the purpose of its collective agreement with the complainant. It refers to a provision in the collective agreement recognizing its right to "subcontract" bargaining unit work if its so doing does not result in loss of employment by existing bargaining unit employees. The decisions are legion that resort to such a clause can only be had if the persons who perform the allegedly "subcontracted" work are in substance the employees of the subcontractor and not of the employer bound by the collective agreement. The drawer of a worker's paycheque is not necessarily her employer in substance. Identification of the true employer of a worker in these circumstances has been the subject of numerous decisions. Reference may be made to *York Condominium Corporation*, [1977] OLRB Rep. Oct. 642, *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538, *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931, *K-Mart Canada Limited*, [1983] OLRB Rep. May 649, *Riverdale Hospital*, (1974) 7 L.A.C (2d) 40 (Schiff), *Short v. J.W. Henderson, Limited*, [1946] S.C. 24 (H.L.) and *Meyer v. J.P. Conrad Lavigne Ltd.*, [1980], 27 O.R. (2d) 129 (Ont. C.A.).

8. Whether the employment of Denise Mayers is examined from the classic "control" or "four-fold" tests or the more recent "organization test" (see *Meyer v. J.P. Conrad Lavigne*, *supra* at pages 132 and 133), Ms. Mayers was undoubtedly an employee of HAVCO both for common law purposes and, more importantly, for the purpose of the *Labour Relations Act* and any collective agreement to which that Act applies. When HAVCO told Olsten's that it had no further use for Ms. Mayer's services, it was terminating her employment. The complainants allege HAVCO did this because Ms. Mayers had indicated her support for the union. They say in their complaint that Ms. Mayers had greater seniority than other Olsten referrals who remained employed after she left. The complaint mentions Anne Phillips as an example. The witnesses acknowledge that Anne Phillips had been at HAVCO for longer than Ms. Mayers. They identified another person, known to them as Allison, as someone who was considerably junior to Ms. Mayers and whom they believed had continued to work at HAVCO after Ms. Mayers was terminated.

9. As it has been shown that HAVCO terminated Ms. Mayers' employment, subsection 89(5) of the Act places the burden of proof with respect to HAVCO'S motivation on HAVCO. Having failed to attend the Board's hearing or give any evidence with respect to that motivation, HAVCO has failed to discharge that burden. In those circumstances, the complainant need not affirmatively prove anti-union motivation, nor need it negative an argument about seniority which was not presented by the respondent at hearing. Bearing in mind subsection 89(5), our finding that she was HAVCO'S employee and the evidence of coincidence in time between HAVCO'S receipt of her dues deduction authorization and its decision to terminate her employment, we find that HAVCO violated sections 64 and 66 of the Act in terminating Ms. Mayers.

10. By way of remedy for this breach we will direct that HAVCO forthwith reinstate her to her former employment and compensate her for any losses she may have suffered as a result of the termination in October 1988. We are satisfied not only that Ms. Mayers was an employee of HAVCO but also that her employment was governed by the terms of the expired collective agreement between HAVCO and the complainants. Therefore, her compensation is to be calculated

with reference to HAVCO'S obligations under that agreement and her employment is to be governed by those terms for so long as they remain in effect.

11. The last collective agreement between HAVCO and the complainants expired at the end of December, 1987. One of the matters dealt with in the Abella panel's decision was the complainants' allegation that the respondent had failed to bargain in good faith with respect to the renewal of that collective agreement. Another was the allegation that the respondent had changed terms and conditions of employment of bargaining unit employees contrary to the "statutory freeze" provisions of subsection 79(1). In this proceeding, the complainants allege that, on the Monday immediately following the conclusion of the Abella panel's hearing in 0577-88-U, the respondent changed the terms and conditions of employment of bargaining unit employees by requiring that they "check in" with the respondent's office when they arrive at their work station and "check out" in the same manner before they leave their work station each day. The evidence presented at our hearing establishes that this is so. Indeed, the respondent has admitted in its reply that it did make such a change. The evidence before us establishes that the respondent had never before imposed such a "check in/check out" requirement, nor had it ever articulated to the complainant the need for such a procedure, either at the bargaining table or otherwise.

12. We do not propose to review here the Board's jurisprudence with respect to section 79(1) of the Act. It is enough to observe that generally worded "management rights" provisions of an expired collective agreement are not sufficient to overcome the special restraint imposed on employers by that subsection during the sensitive phase of collective bargaining to which that subsection relates. We are satisfied that the employer's conduct violates subsection 79(1) and that the appropriate remedy is to require that the respondent revert to and maintain its previous practice for so long as it is legally obliged to do so. For the guidance of the respondent, we note that the expiry of the "freeze" period described in subsection 79(1) would not in itself make a change in this practice lawful. Even after the freeze period expires, a change in terms and conditions of employment may constitute a breach of section 15 of the Act if the change has not first been made the subject of discussion at the bargaining table: see *DeVilbiss (Canada) Limited*, [1976] OLRB Rep Mar. 49, particularly at paragraph 17.

13. At some point before July 13, 1988, the respondent asked the Board to issue summonses directed to Ann Barlowe and Zelma Cochrane returnable at a hearing then scheduled for July 18, 1988. Zelma Cochrane and Ann Barlowe were then the Financial Secretary and Recording Secretary, respectively, of the complainant local union. They were and are employees of HAVCO. The summonses required them to bring to the hearing all the books and records of the trade union then in their custody. The respondent caused each of them to be served with the summons addressed to her, together with (in Ms. Cochrane's case, at least) \$81.00 on account of conduct money and expenses referable to one day's attendance at hearing.

14. The hearing originally scheduled for July 18, 1988 was cancelled. The respondent wrote to the witnesses before that date to advise them of this. When October hearing dates were later established, the respondent wrote to Ms. Cochrane and Ms. Barlowe again to say that "subpoenas already served with conduct money will carry over to the above-mentioned rescheduled dates."

15. Zelma Cochrane and Ann Barlowe attended in accordance with the summonses, which had been issued in connection with complaints which the respondent had filed and which were scheduled for hearing for the same days as the union's complaint in Board File 0577-88-U. Although the respondent's complaints were dismissed on the first day of hearing, the respondent took the position that the summonses it had served should be treated as requiring the witnesses' attendance to give evidence at the hearing in Board File 0577-88-U, which continued beyond that

first day. Ann Barlowe and Zelma Cochrane accordingly attended on the second and third days of hearing in Board File 0577-88-U. At the end of that third day, the respondent's representative advised the Board and Ann Barlowe that her continued attendance was not required. Zelma Cochrane attended on the fourth day of hearing. At the end of that day, the respondent's representative advised the Board and her that her further attendance was not required.

16. The respondent did not provide either Ms. Cochrane or Ms. Barlowe with any conduct money with respect to their second and subsequent days of required attendance at the Board's hearings. The evidence before us is that the union raised with the Abella panel the questions of the respondent's continuing obligation to pay conduct money with respect to the attendance of these two women and that the panel made it clear that such payment was necessary. Despite at least one request made after the conclusion of the hearing, neither woman has been paid the conduct money to which she is entitled with respect to her second and subsequent days of attendance in accordance with the summons served upon her by the respondent. The complainant trade union say that the respondent's failure to pay these women conduct money for the days on which they lost earnings by complying with the summonses the respondent served on them is an unfair labour practice which violates the Act because it amounts to a financial penalty imposed upon them by the respondent by reason of their connection with and support of the complainant trade unions, in furtherance of the respondent's overall scheme to destroy the complainant trade unions financially and otherwise.

17. In the reply filed to this complaint on November 28, 1988, the respondent had this to say about the union's claim concerning non-payment of conduct money:

It is interesting to note that the union is complaining that Ms. Barlowe and Cochrane were only paid conduct and travel money for one day.

Our previous experience in this regard was during an arbitration hearing on August 20th, 1986, where union subpoenaed witness, one Joanne Poirier, was not paid conduct or any other kind of money by the union.

Mrs. Poirier successfully sued the union in small claims court for the money.

Of course, if we owe Barlowe or Cochrane any money we will pay it.

• • •

It would have been useful to know in the Poirier case that failure to pay subpoena money is the basis for a section 89 offence under the Act. However, the Small Claims Court ruled that they did have jurisdiction in the matter.

There can be no doubt whatsoever that the respondent owed each of these women the proper amount of conduct money for each day on which it required them to attend the Board's hearings in accordance with the summons which it had obtained from the Board and served upon them. It was obliged to tender the first day's conduct money with the summons when it was served. It was obliged to pay conduct money for subsequent days of attendance no later than the day on which that attendance occurred. By February 22, 1989, the respondent had not paid the amounts it owed on account of conduct money.

18. The union's allegation about the respondent's motivation for its failure to pay conduct money is not improbable in the circumstances. It is, moreover, the sort of allegation for which subsection 89(5) requires an answer. Nevertheless, we are troubled by the invitation to address payment of conduct money from the perspective of the unfair labour practice sections of the *Labour Relations Act*, particularly when the only remedy claimed is an order that the respondent pay the

conduct money it owes. The proper administration of the Act requires that the parties to proceedings before the Board be in a position to present their case. The *Labour Relations Act* and the *Statutory Powers Procedure Act* both give the Board the power to compel the attendance of witnesses at the request of a party to proceedings in pursuance of that party's right to a fair and thorough hearing of matters relevant to the issues before the Board. Only with great reluctance would we enter into any consideration whether the use of those processes constituted an unfair labour practice. While what has happened here may well be an unfair labour practice, we would not want this employer's perverse and immature approach to labour relations to give rise to a new form of unfair labour practice inquiry with such potentially negative consequences for proceedings with less pathological origins. As the complainants ask by way of remedy for the alleged unfair labour practice no more than that the respondent be made to comply with its existing legal obligation to pay conduct money, we are bound to consider whether we have the authority to direct payment without making a finding that an unfair labour practice has been committed.

19. Under the *Labour Relations Act*, the Board has the power to summon and enforce the attendance of witnesses and compel them to give evidence under oath and to produce such documents and things as the Board may require. The Board also has the power to determine its own practice and procedure. The Board's power to summons witnesses and compel their testimony is repeated in section 12 of the *Statutory Powers Procedure Act* which, in subsection 2, subparagraph (c), adds the requirement that a summons issued by the Board

shall be served personally on the person summoned who shall be paid the like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

Where a summons is issued by this Board at the request of one of the parties to proceedings before it, that party is expected to effect service and pay conduct money in accordance with this requirement. It is on that basis that parties are provided with summonses at their request. Although neither the *Labour Relations Act* nor the *Statutory Powers Procedure Act* ("the SPPA") expressly confers on the Board the power to enforce payment of conduct money, it seems to us that this must be a concomitant of the express power to summons and compel attendance of witnesses, particularly in circumstances where natural justice requires that that power be exercised on behalf of and at the request of parties to proceedings. It is part of the Board's process that conduct money be paid by the parties who request and effect service of a summons. It is arguably an abuse of the Board's process to make use of a summons without discharging the corresponding obligation with respect to conduct money.

20. Subsection 23(1) of the SPPA provides:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

If the power to enforce payment of conduct money by a person who uses a Board's summons is not implicit in the Board's powers to determine its own practice and procedure and to summons and compel the attendance of witnesses, then it seems to us that such a power must flow from subsection 23(1) of the *Statutory Powers Procedure Act*. We are in no doubt of the potential for abuse of the Board's processes by the use of its summonses. A finding that such abuse has occurred is not a prerequisite to the exercise of our power under subsection 23(1) of the SPPA. In order to ensure that such an abuse has not and does not occur in relation to the Board's proceedings, we consider it appropriate for the Board to direct that the conduct money to which Zelma Cochrane and Ann Barlowe became entitled as a result of the respondent's use of the Board's summons in File 0577-88-U be paid by the respondent forthwith, together with interest thereon. While the panel before

whom a witness is summonsed would ordinarily be the best situated to deal with the matter of conduct money, we are satisfied in this case that a referral of this particular issue to the original panel at this point would cause undue delay and would, furthermore, be entirely unnecessary, as we have before us a sufficient basis on which to deal with it ourselves.

21. The trade union argues that a “make whole remedy” should, in this case at least, include an order requiring the respondent to pay all legal and other expenses incurred by the complainants in initiating and pursuing this complaint. The panel which heard the complaint in Board File 0577-88-U had before it evidence of the effect on the local trade union’s treasury of the respondent’s litigious approach to labour relations. The complainants put evidence before us of the nearly exhausted state of that treasury. While we are not at all unsympathetic to the local’s plight, claims for “costs” - that is, that the losing party pay the winners expenses directly related to the litigation before the Board of the proceeding in which the claim is made - have been resisted by the Board for reasons of principle from which the facts of this case do not appear to warrant departure: see *Radio Shack*, [1979] OLRB Rep. Dec. 1220 and *Silknet Limited*, [1983] OLRB Rep. Nov. 1913 at paragraphs 7, 8 and 9. The underlying premise of arguments of the sort made by the union in this case is that there are some recidivist wrongdoers who show themselves undeterred by compensatory remedies which merely require that they do in the end what they ought to have done in the beginning. The answer to this is that while the availability of compensatory remedies may be a deterrent to some potential wrongdoers, deterrence is not the purpose of a compensatory remedy. However worthy a goal deterrence may be, it should not be pursued in the guise of compensatory remedies. There are other ways to deal with continued, contumacious disregard of legal obligations.

22. Apart from being an occasion for exercise by the Board of its remedial jurisdiction, the commission of an unfair labour practice is also a crime for which the wrongdoer may, with leave of the Board, be prosecuted in the criminal courts, where deterrence of continued wrongdoing by the offender and others is one of the objects of sentencing. Deterrence is also the object of proceedings to punish for contempt those who refuse to comply with a decision of this Board; see subsection 89(6) of the Act and section 13 of the *Statutory Powers Procedure Act*. Where the Board finds that an employer has violated the Act, it has the power to order that it cease violating the Act. A failure to abide by that order could be the subject of proceedings for contempt. In this case, we order that the respondent cease violating the sections of the Act which we have found it breached. We do so not as a matter of form, but to ensure that the respondent is exposed to more than simple liability to rectify its wrongdoing if it continues to breach the Act.

23. The complainants have expressly asked for:

- (a) An order directing the Respondent to distribute a decision of the Board signed by appropriate officials of the Respondent to all employees of the Respondent represented by the Complainant.
- (b) An order directing the Respondent to post in conspicuous locations a Board notice to all employees of the Respondent appropriate to the circumstances.

The object of remedies of this sort was addressed by the then Chair of this Board in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 at paragraph 24:

One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of vio-

lating statutory labour laws and that it will henceforth conform to their requirements. This remedy, in the usual form of a posting of a notice for sixty days in a conspicuous location(s) in the workplace, was first developed by the Board in *Radio Shack, supra*, although its origin in labour law is ancient. See for example: *The Falk Corporation* (1940), 308 U.S. 453, 5 LRRM 677 at p. 682; *Bradford Dyeing Association* (1940), 310 U.S. 318, 6 LRRM 703 at p. 715. In more exceptional cases the posting of a notice will be insufficient and mailing, publishing, and reading of notices may be directed in order to redress the impact of unfair labour practices in question. See *Radio Shack, supra*, at p. 1270. See also Comment, Labor Remedies (1968), 54 Virginia L. Rev. 38 at p. 48. And more generally, Comment, *NLRB Remedies - Moving Into The Jet Age* (1975), 27 Baylor L. Rev. 292. However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute's objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

It can always be said that a wrongdoer's displeasure at being subjected to a remedial order may have a negative impact on its labour relations with the party who sought and obtained the order. It does not follow from that or the preamble to the Act that the Board should not exercise its remedial authority at the request of one of the parties to a collective bargaining relationship when an unfair labour practice is committed by the other. We believe a "posting" remedy is likely to serve a useful purpose here, even though this respondent is likely to be displeased by it.

24. Accordingly,

- a) we find and declare that the respondent violated the *Labour Relations Act* ("the Act") by
 - i) on October 24, 1988, terminating the employment of Denise Mayers, who we find was then its employee within the meaning of the Act, and
 - ii) from and after October 24, 1988, during the period described in subsection 79(1) of the Act changing the terms and conditions of employees by requiring that they check in and out by telephone.
- b) we find that the respondent has failed to pay Anne Barlowe and Zelma Cochrane conduct money to which they are entitled as a result of the respondent's having caused them to be summonsed as witnesses to the hearing in Board File No. 0577-88-U;
- c) we direct that the respondent
 - i) cease and desist violating sections 64, 66 and 79 of the *Labour Relations Act*;
 - ii) pay Anne Barlowe \$162.00 for conduct money, plus interest thereon for the period from October 6, 1988 to the date of payment;

- iii) pay Zelma Cochrane \$243.00 for conduct money, plus interest thereon for the period from October 20, 1988 to the date of payment;
- iv) forthwith reinstate Denise Mayers to employment, which employment shall be in accordance with the terms of the most recent collective agreement between the parties for so long as those terms remain in effect;
- v) compensate Denise Mayers for such lost wages and benefits and other losses she has suffered as a result of the termination of her employment, including interest, such losses to be assessed on the basis that the employment from which she was discharged was employment to which the aforesaid collective agreement terms when were then applicable;
- vi) at its own expense, forthwith cause enlarged copies of the attached Notice to Employees marked "Appendix" to be signed by its President and Vice-President and posted in conspicuous places where bargaining unit employees are employed, including all places where notices to such employees are customarily posted, and keep these notices posted for 60 consecutive working days;
- vii) take reasonable steps to ensure that the aforesaid notices are not altered, defaced or covered by any other material;
- viii) provide reasonable physical access to the premises where the aforesaid notices are posted to two representatives of the complainants (who need not be employees of the respondent) from time to time, so that they may satisfy themselves that this posting requirement has been and is being complied with;
- ix) at its own expense, forthwith make copies of this decision and send one by prepaid first class mail, without accompanying comment, to each person employed or engaged in its business on or at any time after October 24, 1988, including all those so employed or engaged at any such time through Olsten or any other employment or referral agency;
- x) discontinue its requirement that employees check in and out by telephone until a new collective agreement is made and it is in a position to lawfully change the terms and conditions of employment of those represented by the complainant.

Interest payable by the respondent is to be calculated by reference to Practice Note 13. The Board remains seized with this complaint and will determine the amounts payable by the respondent if the parties are unable to agree on them.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; March 2, 1989, as amended March 7, 1989

1. I concur with everything in my colleagues' decision except paragraph 23 and the corresponding orders in subparagraph 24(c), items (vi), (vii) and (viii).

2. In principle I consider that requiring a party to sign and post a notice to employees is humiliating and degrading and does not serve any useful purpose in the furtherance of harmonious relations between employers and employees. A directive of this nature will antagonize an already very *unhealthy* ongoing relationship that the parties have experienced in the past. I am further of the opinion that issuing a direction of this nature is not in keeping with the intent of the preamble of the *Labour Relations Act*.

I concur in the requirement that the employer send copies of this decision to all bargaining unit employees.

3. For these reasons I would not accede to the union's request to have the employer post a notice of this nature.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD MADE AFTER A HEARING IN WHICH IT FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT

ON OCTOBER 24, 1988, BY TERMINATING THE EMPLOYMENT OF DENISE MAYERS, WHOM THE BOARD FOUND WAS THEN AN EMPLOYEE OF HAMILTON AUTOMATIC VENDING COMPANY LIMITED WITHIN THE MEANING OF THE ACT, AND

FROM AND AFTER OCTOBER 24, 1988, DURING THE PERIOD DESCRIBED IN SUBSECTION 79(1) OF THE ACT, BY CHANGING THE TERMS AND CONDITIONS OF EMPLOYEES BY REQUIRING THAT THEY CHECK IN AND OUT BY TELEPHONE.

THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THOSE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL FORTHWITH REINSTATE DENISE MAYERS TO EMPLOYMENT, WHICH EMPLOYMENT SHALL BE IN ACCORDANCE WITH THE TERMS OF THE MOST RECENT COLLECTIVE AGREEMENT BETWEEN THE PARTIES FOR SO LONG AS THOSE TERMS REMAIN IN EFFECT.

WE WILL COMPENSATE DENISE MAYERS FOR ALL LOST WAGES AND OTHER LOSSES SHE HAS SUFFERED AS A RESULT OF THE TERMINATION OF HER EMPLOYMENT, INCLUDING INTEREST, SUCH LOSSES TO BE ASSESSED ON THE BASIS THAT THE EMPLOYMENT FROM WHICH SHE WAS DISCHARGED WAS EMPLOYMENT TO WHICH THE AFORESAID COLLECTIVE AGREEMENT TERMS WERE THEN APPLICABLE.

WE WILL DISCONTINUE OUR REQUIREMENT THAT EMPLOYEES CHECK IN AND OUT BY TELEPHONE.

HAMILTON AUTOMATIC VENDING COMPANY
LIMITED

PER: _____
PRESIDENT

PER: _____
VICE-PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 2ND day of MARCH, 1989.

2007-88-R; 2603-88-U United Food and Commercial Workers International Union, Local 1000A, Applicant v. **Hillview Farms Limited**, Respondent v. Group of Employees, Objectors; United Food and Commercial Workers International Union, Local 1000A, Complainant v. Hillview Farms Limited, Respondent

Bargaining Unit - Certification - Employee - Employer - Whether a practice exists with respect to the use of part-time employees sufficient to warrant their exclusion from the bargaining unit - Use of part-timers restricted to 1988 - Board satisfied that a practice existed after looking at the nature of the business - Employer engaged in the preparation of soil for the home garden market - Employer not engaged in the business of agriculture and/or horticulture - Certificate issuing

BEFORE: S. A. Tacon, Vice-Chair, and Board Members M. Rozenberg and R. Montague.

APPEARANCES: Bram Herlich, Kevin Corporan and Kim Bernhardt for the applicant/complainant; W. J. McNaughton and T. Masek for the respondent; no one appearing on behalf of the objectors.

DECISION OF THE BOARD; March 3, 1989

1. As noted in a decision dated December 21, 1988, the parties remained in dispute with respect to two matters, namely, whether persons regularly employed for not more than twenty-four (24) hours per week should be included in or excluded from the bargaining unit and whether or not the respondent is engaged in the business of agriculture and/or horticulture and so not subject to the *Labour Relations Act* by virtue of sections 2(b) and/or 2(c) of the Act.

2. As directed, a Board Officer inquired into the employment records of the respondent with respect to whether there existed a pattern of employing persons on a part-time basis. Further, the parties filed an agreed statement of facts, including various exhibits, describing the respondent's enterprise. At the hearing on February 16, 1989, the Board heard submissions with respect to both issues. As well, the Board, following representations, directed that a section 89 complaint filed by the applicant in the certification proceeding be set down for hearing on a peremptory basis on March 8, 9, 29 and 31, 1989 (Board File 2603-88-U). In that regard, the Board also directed that the respondent file a written reply with the Board, and copied to the complainant by February 27, outlining its response to Schedule B of the complaint and indicating those material facts on which it relies.

3. The Board next sets out the submissions of counsel in a highly abbreviated form. As agreed, representations did not deal with the Charter. That is, the applicant reserved the right to argue that sections 2(b) and 2(c), if found by the Board to be applicable, are contrary to the *Canadian Charter of Rights and Freedoms*. Thus, submissions were restricted to the issues of the part-time employees and whether sections 2(b) and/or 2(c) applied in the first instance.

4. Counsel for the respondent reviewed in detail the agreement on facts and documentary material in support of his submission that the respondent's business was the preparation of soil for sale to the home garden market. It was asserted the respondent's operation largely involved the reproduction, at a faster rate and in a more consistent fashion, of the natural decomposing process. As the company's product was soil, counsel contended that this constituted a segment of the agricultural and/or horticultural process and, therefore, was excluded from the ambit of the *Labour Relations Act*. It was asserted that the fact that the preparation of the soil occurred at the respondent's premises rather than the end-user's location was irrelevant. With respect to the part-time

issue, counsel submitted that the evidence of the hiring of part-time staff for several weeks during the company's peak period in 1988 was sufficient to warrant the exclusion of this category, at the request of either party, in accordance with Board practice. Cases reviewed and referred to in support included: *Ontario Tree Fruits Co-operative Limited* (1962), 62 CLLC 1044; *McLean-Peister Limited* (1962), 63 CLLC 1139; *Re Cedarvale Tree Services Ltd.*, (1971), 22 D.L.R. (3d) 40 (Ont. C.A.); *Chatham Horticultural Society*, [1980] OLRB Rep. Apr. 409; *Wellington Mushroom Farm*, [1980] OLRB Rep. May 813; *Cuddy Chicks Limited*, [1988] OLRB Rep. May 468; *Spruceleigh Farms, A Division of Canada Packers Limited*, [1972] OLRB Rep. Oct. 860; *Calvert-Dale Estates Limited*, [1971] OLRB Rep. Feb. 58.

5. Counsel for the applicant first dealt with the part-time employee issue. In this regard, counsel reviewed the evidence and submitted that the evidence was not sufficient to constitute a practice. It was noted that the Board had not established a formula for that determination but it was argued that the instant application more closely resembled an isolated instance of hiring part-time employees than an established practice. Cases referred to on this aspect were: *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324; *Hudson's Bay Company*, [1985] OLRB Rep. Dec. 1744; *Temspec Inc.*, [1985] OLRB Rep. May 756. Counsel then reviewed in some detail the evidence with respect to the respondent's operation. It was contended that the respondent bore the onus of establishing the business fell within the ambit of section 2(b) and/or 2(c) and that the *Labour Relations Act*, as remedial legislation intended to extend bargaining rights, should be interpreted broadly and any exclusion should be given a restricted meaning. Counsel emphasized that the respondent's operation did not concern a "living, growing organism" but merely the mixing and packaging of one ingredient (the soil) useful for agriculture and/or horticulture in the same way a "tractor" would be useful. Thus, counsel submitted the process was the manufacture and packing of products used in agriculture and/or horticulture rather than those activities themselves and, hence, the enterprise did not fall within the reach of sections 2(b) and or 2(c). In the alternative, if the business was so characterized, it was argued only those few employees actually engaged in the windrow operation (referred to as the "hill gang") should be excluded, i.e., that small part of the enterprise should be severed from the rest. Cases cited were: *Ontario Tree Fruits Co-operative Limited*, *supra*; *MacLean-Peister Limited*, *supra*; *Federal Farms Limited* (1963), 63 CLLC 1213; *The University of Guelph*, [1966] OLRB Rep. Sept. 394; *Sunnylea Foods Limited*, [1980] OLRB Rep. Apr. 530; *Wellington Mushroom Farm*, *supra*; *Cuddy Chicks Limited*, *supra*.

6. In reply, counsel for the respondent asserted the term "practice" did not require that part-time employees be present for all or a specific portion of the year provided, as here, they were, in fact, regularly employed for not more than twenty-four (24) hours per week. With respect to the severability argument, counsel contended the cases wherein a portion of the enterprise was severed concerned situations where the portion so severed was not integral to the operation. In this instance, the production of soil was integral to the respondent's business and constituted all but a small percentage of that business. Hence, it was argued that severance was not an option in the instant circumstances.

7. The facts in this case are not in dispute and are contained in the agreement on facts, the documentary material filed on consent and the Board Officer's report. Hence, the Board need not separately set out its findings of fact but, instead, refers to those facts regarded as relevant as appropriate throughout the Board's analysis of the issues.

8. The Board intends to deal first with the question of the bargaining unit description, that is, whether persons regularly employed for not more than twenty-four (24) hours per week should be in or excluded from the unit. There was no dispute with respect to the Board's practice to exclude part-time employees and/or students employed during the school vacation period where

persons in those categories are employed on the certification application date or where the respondent has a history of employing such persons: *Inter-City Bandag, supra*; *Hudson's Bay Company, supra*; *Temspec Inc., supra*. Absent either of those circumstances, Board policy would preclude the exclusion of non-existent categories of employees. There is also no disagreement that there is a history of employing students during the school vacation period. Indeed, the parties agreed that students employed during the school vacation periods should be excluded from the bargaining unit.

9. What is at issue is whether the evidence disclosed in the Board Officer's report constitutes a "practice". The report indicates that, in 1988, the respondent employed six persons for the period April 2 to May 13 on a regular basis for not more than twenty-four hours per week. The respondent asserts that is sufficient to constitute a practice, as that term is used by the Board. The applicant disagrees.

10. While the Board policy of excluding part-time employees and/or students employed during the school vacation period is firmly entrenched, there has been virtually no fleshing out or defining of the terms "practice" or "history". In *Inter-City Bandag, supra*, and *Hudson's Bay Company, supra*, the Board spoke in conclusionary terms of a "history" of students employed during the school vacation period and no "history" of part-time employees without indicating the factual basis for that finding. The Board is not doubting the correctness of the finding; it is simply noting that those cases are of little assistance in resolving the issue in the instant application as to whether the evidence herein constitutes a "practice". In *Temspec, supra*, the Board held that a single instance wherein a former full-time employee was employed on mutual agreement as a part-timer on her return from maternity leave and before she recommenced full-time employment did not amount to a practice. The applicant seeks to portray the instant facts as within the principle expressed in *Temspec, supra*. That is, the employment of part-timers occurred only in 1988 and only for a portion of that year. With respect, the Board disagrees.

11. In the Board's view, the term "practice" as used in reference to part-time employees or students employed during the school vacation period is not capable of being given a precise, inflexible definition arithmetically expressed. Nor should the Board seek to approach that question in a mechanistic way. Rather, the Board must look to the nature of the enterprise, including the impact of that type of business on what might reasonably be expected to be the demand for part-time employees or students employed during the school vacation period. The actual numerical evidence, i.e., the numbers of such employees, the number of weeks employed etc., is patently relevant but must be placed in the context of the enterprise itself. What might be regarded as sufficient use of part-time employees to constitute a "practice" in one enterprise might be insufficient in another. Thus, the Board approaches this issue on a case by case basis, weighing the actual use of part-timers in the context of the operation.

12. In the instant case, while the evidence of the use of part-time employees is restricted to 1988, this must be weighed in the context of the agreed facts which refer to new owners having introduced new operating systems including the use of part-time employees in the 1988 peak period and the expanded use of students. Thus, 1988 was the first year wherein one would expect evidence of part-time employee hirings and, indeed, this occurred. Moreover, in 1988, the part-timers were employed for those weeks representing the peak period in a seasonal operation. Thus, the Board is satisfied that a "practice" exists with respect to the use of part-time employees sufficient to warrant their exclusion from the bargaining unit in conformity with Board practice, where so requested by a party.

13. The Board next turns to the question as to whether the applicant is barred by virtue of section 2(b) or 2(c) of the Act. Those sections read:

2. This Act does not apply,

• • •

(b) to a person employed in agriculture, hunting or trapping;

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

• • •

14. Section 2(b) of the Act has been considered in a number of cases which need not be reviewed in detail herein. While the term “agriculture” is not amenable to precise definition, the characterization of the word in *Ontario Tree Fruits Limited, supra*, is useful:

A fair summary of these definitions is that agriculture means the cultivation of soil for the purpose of producing products for the use of man or beast, but in all events the prime aspect of agriculture is that of production.

It is the nature of the operation which must be considered. Commercial enterprises which involve the preparation of produce for market do not fall within the ambit of section 2(b), albeit the produce may remain in its natural state: *Federal Farms Limited, supra*. Thus, the trimming, washing, grading and packing of vegetable produce in a plant was not found to be “agriculture”: *Federal Farms Limited, supra*. Likewise, the storing, grading, packing, warehousing and marketing of tree fruits fell outside the section: *Ontario Tree Fruits, supra*. An egg grading operation where eggs were washed, candled, graded, packed and shipped was found not to be “agricultural”: *Sunnylea Foods Limited, supra*. On the other hand, the fact that the undertaking is highly mechanized and is situated in an “industrial type” setting does not alter the character of the operation: *Wellington Mushroom Farm, supra*; *Cuddy Chicks Limited, supra*. In those two cases, the growing of mushrooms and a chicken hatchery were encompassed by section 2(b); see also *Spruceleigh Farms, supra*. Thus, the Board has generally distinguished the actual production of crops or livestock from the later grading, cleaning, processing, packing and shipping of those products unless those latter functions are also performed by the primary producer itself as an integral part of the growing and harvesting of crops or the raising of livestock: *Sunnylea Foods, supra*; *Federal Farms, supra*; *University of Guelph, supra*.

15. Respondent’s counsel focussed on the “preparation of the soil” as descriptive of the respondent’s operation and as a definable segment of the agricultural process. Therefore, counsel urges the Board to characterize the enterprise itself as agriculture. The Board does not agree. Rather, in the Board’s opinion, the operation is more akin to those commercial enterprises wherein the product is prepared for market: *Ontario Tree Fruits, supra*; *Federal Farms, supra*; *Sunnylea Foods, supra*. The respondent starts with a natural product (manure, wood shavings, sawdust, leaves, natural top soil, peat moss, black muck, etc.), processes that product (through composting, including the addition of liquid nitrogen, pesticide, insecticide, perlite, vermiculite and sand depending on the product category), then screens, packages, stores and ships the end product (“soil”, in a broad sense). The respondent’s business is not essentially different from the production of chemical fertilizers in a plant; it is just that the respondent’s product is a “natural” or “organic” form of fertilizer destined for the home garden market, usually to be added to or mixed with existing soil in gardens or indoors for potted plants. The documentary material, in particular, makes this clear. That the product (“soil”) may ultimately be utilized in an agricultural or horticultural enterprise (although the respondent candidly concedes the market is the homeowner or apartment dweller not a large scale agricultural or horticultural operation) does not change the

character of the *respondent's* business to "agriculture". Thus, the Board finds that the enterprise is not agricultural and is not excluded from the scope of the Act by virtue of section 2(b).

16. The Board need not deal extensively with the question as to whether the operation falls within section 2(c), i.e., whether the employees are employed in horticulture by an employer whose primary business is horticulture as, in the Board's view, the analysis is similar. The term "horticulture" was considered in *Re Cedarvale Tree Services Ltd.*, *supra*, and that definition applied in *Chatham Horticultural Society*, *supra* (see paragraphs 11 to 14 inclusive) to sustain a finding that the enterprise therein was covered by section 2(c). In that latter case, the respondent was actively and primarily engaged in the preparation, planting and maintenance of City gardens, planters and flower boxes. Likewise, a landscape gardening and nursery enterprise engaged on a sodding contract was found to fall within section 2(c): *McLean-Peister Ltd.*, *supra*. In the instant case, however, the respondent's operation is more accurately depicted as the production of organic, natural fertilizer conveniently packaged in a variety of formats for use indoors or outdoors by the home gardener. Therefore, the Board further finds that the enterprise does not fall within the ambit of section 2(c) of the Act.

17. In reaching its conclusion, the Board has not found it necessary to consider the "kitty litter" product or the "aggregates" product which the respondent concedes cannot be characterized as agriculture or horticulture. That is, the Board has determined that the production of "manure", "top soil" and "potting soil" constitutes a commercial operation which begins with, processes and then ships "natural" products; the enterprise is neither agriculture or horticulture. Consideration of the "kitty litter" product and the "aggregates" product, however, strengthens the Board's characterization of the respondent's operation as a commercial enterprise rather than agriculture or horticulture. Given the Board's characterization of the operation, the Board need not deal with the applicant's alternative submissions regarding severability. Finally, given the Board's finding, the Charter argument which was reserved by counsel for the applicant (as noted in paragraph 3 above) need not be considered.

18. Having regard to the foregoing, the Board finds that the certification application is not precluded by reason of section 2(b) or 2(c) of the Act. Further, the Board finds that the bargaining unit description is as follows:

all employees of the respondent in Norwich Township, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods.

19. Given the level of membership support enjoyed by the applicant (as found in the December 21, 1988 decision), a certificate shall issue. Board File No. 2603-88-U is referred to the Registrar to be listed for hearing on March 8, 9, 29 and 31, 1989.

2803-86-U Balford Lindsay, Complainant v. Canadian Auto Workers Union Local 1451, Respondent v. Budd Canada Inc., Intervener

Duty of Fair Representation - Unfair Labour Practice - Failure to pursue grievances to arbitration not breach of fair representation duty -Board not deciding issue of whether union's refusal to give the complainant a copy of the grievance filed on his behalf amounted to a breach of the Act - No remedy would have been granted in any event -Complaint dismissed

BEFORE: *Owen V. Gray*, Vice-Chair.

APPEARANCES: *Balford Lindsay* on his own behalf; *L. N. Gottheil, Ken Wright, Mike King, George Doherty* and *Ken Pickering* for the respondent; *Robert J. Atkinson, Mike Balog* and *Jack Boehmer* for the intervener.

DECISION OF THE BOARD; March 31, 1989

1. Balford Lindsay has been employed by Budd Canada Inc. ("Budd") since September 1974 in a bargaining unit now represented by the respondent union. This decision deals with a complaint he filed under section 89 of the *Labour Relations Act* ("the Act") on January 7, 1987, alleging that "on or about December 1978 & October 1984" he was dealt with "by Mike King, Kenneth Pickering & George Doherty Plant Chairman, Benefit Representative & Committee Man (respectively)", in that they did "misrepresent me as well as fail to provide me with a copy of the grievance." While the complaint itself mentioned no section of the Act other than section 89, the complainant's position is that the union's conduct violated section 68 of the Act. It appears that Local 1451 of the United Auto Workers was the trade union which represented Mr. Lindsay during the period to which this complaint relates. Although the named respondent denies its predecessor breached the Act, it does not dispute its responsibility for any breach its predecessor may have committed.

2. Mr. Lindsay testified on his own behalf on the first day of hearing. He was directed to describe more precisely and in detail the acts and omissions which he said amounted to a violation of the Act by the trade union. He was told these proceedings would not deal with any complaint he did not outline in his examination in chief. He said the actions for which he sought a remedy were the failure of the union to pursue certain grievances: one which had been filed with respect to Budd's having refused to pay weekly indemnity benefits in 1978 and two which he thought had been filed with respect to Budd's having refused to allow him to return to work from a medical leave of absence between September 1983 and March 1984. After his return to work in March 1984, he spoke about the latter grievances to Tony Collins, a member of management, who he said told him that the union had filed no such grievances and was pulling his leg when it told him it had. He then began asking union representatives for copies of both the 1978 grievance and the grievance the union said it had filed concerning his return to work in 1984, but was told he could not have copies because they were the property of the union.

3. Mr. Lindsay said he also felt he had been unfairly dealt with in other respects after his return to work in March 1984. He mentioned particularly the union's handling of two grievances which subsequent evidence establishes were filed in October of 1984, an altercation which took place in December 1984 between a union official and himself and the union's alleged refusal to allow a member of its executive to represent Mr. Lindsay in a proceeding before the Workers' Compensation Appeals Tribunal. He said these additional allegations were not matters for which

he sought some remedy, but merely evidence of the union's attitude toward him at the time the subject matter of his complaint arose.

4. The first day of hearing adjourned at the end of Mr. Lindsay's testimony in chief, so that the respondent and

intervener (who were not represented by counsel at that time) could prepare to meet the case outlined by Mr. Lindsay. On the second day of hearing, the respondent and intervener were represented by counsel, who argued that the complaint should be dismissed without a hearing because of Mr. Lindsay's delay in filing it. After hearing the parties' evidence and submissions on the delay issue, I determined that I would not inquire into the complaint that the union's failure to pursue the 1978 grievance was a breach of the Act, but would hear the balance of the complaint. I undertook to give written reasons for that determination, and I do so now.

5. Mr. Lindsay was absent from work for a couple of months following an automobile accident in August 1978. He received weekly indemnity payments for the first month of his absence, but payments were thereafter cut off because, his employer said, he had been working in a record store he then owned. He denied he had been working in the store himself, and a grievance was filed. He was involved in another automobile accident in 1979 which resulted in his having surgery in 1980 and being absent on sick leave for nearly five years. Both before and after the surgery Ken Pickering told him that the union would not take his grievance to arbitration. In late 1982 the local's president, Mr. McKinnon, confirmed to him that the grievance was not being pursued. Thereafter, Mr. Lindsay made no complaint to the union about this until late 1984, by which time the union had discarded its file on the matter. That file included notes Mr. King had made during the processing of the grievance about an investigator's report which the company told him it relied on. By the time it had notice of this complaint, the company had also discarded its file on the grievance, including the investigator's report. Mr. Lindsay had no explanation for his failure to pursue the matter of the 1978 grievance from late 1982 to late 1984, other than that he had been dealing with his injuries and other concerns during the period before his return to work from sick leave.

6. When he was unable to get copies of grievances after his return to work in 1984, Mr. Lindsay retained a lawyer to deal with the matter. In February 1985, the lawyer wrote to Mike McKinnon, the president of the local union, asking for information and documentation about those grievances. When that letter and a March reminder were not answered, he wrote in May to Robert White, then the UAW Director for Canada, who passed the matter on to International Representative Bruce Davidson. By mid June of 1985, all Mr. Lindsay's lawyer had was a letter from Mr. Davidson saying Mr. McKinnon would try to call him to find out what he wanted.

7. When Mr. McKinnon finally spoke to the lawyer, he suggested (or so the lawyer told Mr. Lindsay) that Mr. Lindsay come and speak to him. Mr. Lindsay made an appointment to see Mr. McKinnon. Mr. McKinnon failed to keep the appointment. Mr. Lindsay made another appointment. Mr. McKinnon failed to keep that appointment. Mr. McKinnon kept the third appointment he made to see Mr. Lindsay, but by then would only say that he could not deal with the matter because he was leaving the local. He said Mr. Lindsay would have to see the vice-president of the local, John Diver. Mr. Lindsay then met with Mr. Diver, who told that him that he upheld whatever the plant committee decided about his grievances and that Mr. Lindsay could not have copies of the grievances because they were the property of the union. Having decided by this point that he would try to deal with the matter without the lawyer's further assistance, Mr. Lindsay had two further meetings, one with Mike King, the plant chairman, and one with Bruce Davidson. The latter meeting did not take place until the spring of 1986, in part because of some misunderstanding about the location of a meeting scheduled earlier. These meetings did not resolve Mr.

Lindsay's concerns. Mr. Davidson told him he could have recourse to this Board if he remained dissatisfied. He was by then already aware that a complaint could be made to the Board. He filed this complaint several months later, in January 1987.

8. Subsection 89(4) of the Act says that the Board "may" inquire into a complaint that the Act has been contravened. The use of the word "may" gives the Board a discretion to enquire or not, as it sees fit. The Board has decided not to enquire into complaints when a complainant's unjustified delay in lodging a complaint is so extreme as to make it unfair to the respondent to entertain the complaint: *CCH Canadian Limited*, [1977] OLRB Rep. June 351; *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113 (jud. rev. denied *Re Dhanota and International Union United Automobile, Aerospace and Agricultural Workers of America (U.A.W.)*, Local No. 1285; *Sheller-Globe of Canada Ltd.* (1983), 42 O.R. (2d) 73 (Ont. Div. Ct.)); *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; *Chrysler Canada Ltd.*, [1983] OLRB Rep. Apr. 490; *John T. Hepburn Limited*, [1984] OLRB Rep. Jan. 39; *General Motors of Canada Limited*, [1985] OLRB Rep. May 684 (jud. rev. denied April 6, 1987, Ont. Div. Ct., unreported). The extent to which the delay has prejudiced the respondent's ability to answer the complaint is a major consideration in assessing whether to dismiss it because of the complainant's delay in filing it. In that connection, the Board considers whether the respondent had prior notice that the complainant challenged the propriety of the conduct in issue. When it did, the Board also considers whether and to what extent the respondent caused, encouraged or acquiesced in the delay in its dealings with the complainant concerning that challenge.

9. For at least two years before he began asking in 1984 about his 1978 grievance, Mr. Lindsay had neither said nor done anything which would have alerted the trade union that the propriety of its actions in handling that grievance was a live issue. If Mr. Lindsay had pursued the matter in a timely fashion, the union would have known not to dispose of its file on the grievance. Not having that file severely prejudiced any defence of the complaint that it had not represented Mr. Lindsay properly in connection with that grievance. I was satisfied that in these circumstances I should not entertain that aspect of the complaint, and so ruled orally on May 14, 1987.

10. By way of contrast, from the evidence before me at that time it appeared that Mr. Lindsay's dissatisfaction and concern about the handling of his return to work grievance and his inability to get copies of grievances would have been apparent to the union within a few months, at most, of his return to work. Most of the complainant's subsequent delay in filing a complaint about these matters is explained by the union's refusal of or delays in providing information, its encouragement of or acquiescence in Mr. Lindsay's first discussing the matter with its officials and officials of the parent union before pursuing legal remedies and its delays in scheduling and engaging in those discussions. While Mr. Lindsay could have filed his complaint more promptly after those discussions ended in the spring of 1986, nothing occurred between then and January 1987 which particularly prejudiced the union's defence of these aspects of the complaint. It did not seem to me that unexplained portion of the delay was in any way extreme in circumstances where the respondent local union would leave letters to its president unanswered for months. Having regard to the nature of the complaint and the relief sought, I concluded that the prejudice caused to the intervenor employer by the delay could be adequately minimized in the fashioning of a remedy if the complaint succeeded. For these reasons, I also ruled on May 14, 1987, that I would hear the balance of the complaint.

11. On the next and fourth day of hearing, Mr. Lindsay filed a letter asking to change his position with respect to the matters in respect of which he claimed relief. After hearing the parties' submissions, I made the following ruling:

Mr. Lindsay complains that the respondent union violated section 68 of the Act. The written complaint filed January 12, 1987, identifies December 1978 and October 1984 as the dates of the alleged violations. Like most section 68 complaints filed with the Board, it does not clearly indicate the full nature and scope of the complainant's allegations against the union.

On the first day of hearing, Mr. Lindsay took the stand and was asked to outline his case against the union by way of giving his evidence in chief. When he said he had finished his evidence in chief, it was clear that the alleged violation referable to December 1978 had to do with the failure of the union to pursue to arbitration a grievance about the denial of weekly indemnity benefits to which Mr. Lindsay felt entitled in the fall of 1978. It was also clear that the alleged violation referable to October 1984 had to do with the refusal of the union to pursue to arbitration (or, perhaps, at all) a grievance about his employer's failure to recall him to work in the fall of 1983 rather than in March of 1984, when he was recalled after nearly five years' absence on sick leave.

During his examination in chief, Mr. Lindsay made reference to an altercation with a union official at a meeting during which he was denied copies of the aforesaid grievances. It was apparent at the end of the first day of hearing that this and other refusals of copies of these grievances were also alleged to be violations of section 68 in respect of which some remedy would be sought and that the physical assault which allegedly occurred on that date was offered as evidence of bad faith on the part of union officials. It was also clear, however, that no claim was being made for a remedy with respect to the assault itself. During his examination in chief, Mr. Lindsay also testified about the union's failure to pursue other grievances on his behalf, as further evidence of the union's bad faith but not as matters in respect of which some specific remedy was being claimed. The hearing adjourned at the conclusion of the complainant's examination in chief.

On the second day of hearing, the respondent union and intervener employer were represented for the first time by counsel. They submitted that the complaint should be dismissed by reason of the complainant's delay in filing it. I concluded that all evidence with respect to delay should be put before me. The complainant was allowed to augment his examination in chief on this point and he was cross-examined on matters relating to delay. He called no other witnesses with respect to delay. The union called one witness. For reasons which I have undertaken to provide at a later date, I dismissed the complaint with respect to the alleged violation in 1978. At the end of the two hearing days devoted to the delay issue, that left the failure to pursue the 1984 grievance and the failure to provide copies of grievances as the only violations in respect of which a remedy was being sought. The complainant had indicated that the remedy sought was referral of that grievance to arbitration.

The fourth day of hearing began with cross-examination of the complainant on the merits of the complaint. During the lunch break that day, the complainant filed a letter requesting

- 1) That the Board deal with remedy itself rather than refer the matter to arbitration.
- 2) That he be permitted to claim compensation for the alleged physical assault; and,
- 3) That he be permitted to claim compensation with respect to the handling of the other grievances to which reference was made in his evidence in chief.

Mr. Lindsay wishes to offer further evidence in chief with respect to the last two matters.

As for the first matter, the nature of the remedy can be addressed in argument. The proper scope of this hearing does not change if the possibility of the Board's addressing the merits of the grievance in a subsequent compensation hearing remains open: see *Gerald Lecuyer*, [1987] OLRB Rep. Jan. 72. As for the other two matters, counsel for the respondent and intervener argue that a claim for remedy with respect to these matters should not now be introduced into these proceedings, because this would impair the integrity of the Board's process. They do not ask me to rule that those matters cannot be the subject of a claim for remedy in some other complaint. That would be a matter to be determined by the panel or Vice-Chair hearing such a complaint.

Recognizing that this may expand the amount of time devoted by the Board to these matters if they become the subject of a further complaint, I do think this proceeding has reached the point at which the scope of the complaint should not be expanded beyond what had been established at the end of the last day of hearing.

The Board's approach to matters of pleading where unrepresented section 68 complainants are concerned has often been to let the complainant particularize and define the complaint during his or her examination in chief, rather than engage in debates over the sufficiency of what he or she wrote on the complaint form by which the proceedings were initiated. Respondents and interveners are told that a benefit of this approach is that at the end of the examination in chief they know what case the complainant has made or will seek through other witnesses to make against them, and that any arguments about delay or lack of a *prima facie* case can then be made with respect to that case and not some document or opening statement which the complainant may later complain did not set out his or her full story. If that approach is to have credence then, when the other parties insist, the Board should ordinarily limit the complainant to the case he describes when given that sort of opportunity.

Accordingly, in this proceeding I will not entertain a claim for remedy with respect to the alleged physical assault or the "Ken Shelley, Ray Caron" grievances. I should not be taken as having decided whether the Board will entertain such a claim in another proceeding.

I would add that I should not be taken to have accepted that the facts Mr. Lindsay had alleged con-

cerning the occasion of the alleged physical assault would, if proven, have warranted a finding that the assault constituted a violation by the union of section 68 of the *Labour Relations Act*.

12. The hearing of this complaint thereafter occupied 15 further days of hearing (not counting 2 days cut short by the unavailability of a witness), spread out over as many months. Mr. Lindsay acted on his own behalf throughout. In assessing the consistency and accuracy of Mr. Lindsay's recollections, I had the benefit not only of having seen and heard his testimony in chief and reply but also of seeing how he dealt with the many discussions which arose during the hearing concerning the nature of the process, his role in it, the relevance of evidence, the course the hearing had taken and the course it was taking. Although he was articulate and intelligent and, for the most part, soft-spoken, Mr. Lindsay's memory was not particularly good with respect even to events which took place mere weeks before, during the hearing itself. With respect to the events in issue, his recollections were often at variance with what was recorded in or could be inferred from contemporaneous documents which had been prepared in circumstances which made them reasonably reliable. Furthermore, the susceptibility of his recollections to the influence of what he would have perceived to be his interests substantially surpassed anything I could attribute to any of the other interested witnesses. Indeed, Mr. Lindsay was wont to change his story as time went on. I do not know whether he did so consciously. One fairly conspicuous example of this was in his characterization of Dr. Richter, who figures in the events leading to his return to work in 1984.

13. Mr. Lindsay's neck had been broken in the automobile accident of 1979. The operation in 1980 involved a spinal fusion. Mr. Lindsay received long term disability benefits while unable to work. He ceased receiving those benefits in 1983, when the insurer concluded he was capable of returning to the work force to some degree, apparently on the basis of his family physician's statement that he was capable of "sedentary" part-time employment. In September, 1983, he sought to return to work at Budd. He brought a note from his family physician dated September 30th stating that he was able to return to "his regular job or lighter duty." There had been a layoff during his absence. The evidence shows that he did not just then have the seniority necessary to claim either his regular job - fork lift operator - or any lighter duty job. All his seniority entitled him to were heavier jobs. He was asked for a note outlining the restrictions on his working. He brought another note from his family physician dated October 6th, stating that he could not lift more than 10 kilograms, nor stand for more than three hours without a rest, nor work while looking up or with his arms above his head. The jobs for which his seniority then entitled him often involved lifting more than 10 kilograms.

14. Mr. Lindsay's version of events following the second doctor's note is that he was told he did not have seniority to return to any job. According to him, both Tony Collins, the person to whom he spoke in Budd's personnel department, and Ken Pickering, the union benefits representative to whom he spoke on each occasion after visiting Mr. Collins, acted as though they thought he could not return to work and it seemed as though they did not want him to return to work. Some time later in the fall he learned he had been on the recall list all along. On November 2nd he brought a note from his family physician saying he could work without restrictions. Thereafter, he was examined by the company doctor, who he says told him there was no reason he could not return to work. Some time later he made an appointment to see Dr. Richter, whom he described in his evidence in chief as "my specialist". It took until February 23, 1984 to get in to see him. Dr. Richter wrote a letter to Tony Collins dated that day, to the effect that Mr. Lindsay was well enough to return to a job requiring vigorous activity. Mr. Lindsay delivered the letter that day. Two or three business days later, Budd decided to allow him to return to work. Although Mr. Lindsay's recollection is that he was not contacted to return to work until about two or three weeks after that (for which delay he blames Mr. Pickering), the evidence establishes that a telegram was sent to him on February 29, 1984 and that he returned to work on March 1st. He says that some

time in the fall of 1983 he asked Mr. Pickering to grieve the company's refusal to return him to work and signed a blank grievance form at Mr. Pickering's request. He says he asked Mike King to do the same some time before he returned to work.

15. During cross-examination on June 23, 1987, Mr. Lindsay again referred to Dr. Richter as "my specialist". He also agreed with the suggestion that Dr. Richter was the doctor who had the best handle on how he was doing at the time he was seeking to return to work. When his cross-examination continued on July 8, 1987, he agreed with the statement that "your orthopedic specialist was Dr. Richter". He denied having been told in the fall of 1983 and the winter of 1984, by Tony Collins and Ken Pickering and Mike King, that the company would not allow him to return to work without obtaining an opinion from his specialist that he was fit to return to work. He was unable to explain convincingly why he would have made the appointment to see his specialist and get this note if no-one had told him that such a note was needed.

16. The evidence of Tony Collins and Ken Pickering and Mike King was that they told Mr. Lindsay it was his employer's position that he needed an opinion from his specialist before he could return to work, in view of the seriousness of his injuries. Ken Pickering testified Mr. Lindsay had told him that Dr. Richter was reluctant to give such an opinion in writing and that it was hard to get an appointment to see him. Mr. Pickering testified that he asked if he could speak to Dr. Richter directly, and Mr. Lindsay said yes. He did that. Mr. Lindsay then made an appointment to see Dr. Richter. Once he got the letter, the union had what it needed to argue for his return, which they did. In his cross-examination of Ken Pickering on May 24, 1988, Mr. Lindsay challenged this story by asserting that Dr. Richter was not his specialist, but only a doctor who had been hired by the lawyer handling his lawsuit over the motor vehicle accident to evaluate his damages. By the end of the hearing he was arguing forcefully that Dr. Richter was not his doctor - this in the face of the letter he procured from Dr. Richter and delivered to his employer, which begins with the words "Mr. Lindsay has been under my care previously following a neck injury ... ". Of course, it does not matter what the precise relationship was between Mr. Lindsay and Dr. Richter. The significant thing is that Mr. Lindsay was prepared to describe that relationship in a particular way at one point in the hearing and then attack the same characterization when it was employed by the union. Because of that and a number of other features of his testimony and argument, I did not find Mr. Lindsay a particularly reliable witness. Where it differs from that of Mr. Lindsay, I accept the evidence of Tony Collins, Ken Pickering and Mike King with respect to their dealings with him concerning his return to work grievance.

17. Dr. Casey does not recall telling Mr. Lindsay that there was no reason why he could not return to work. His having done so would not be consistent with the notes he made at the time, which are consistent with the doctor's recollection that, at the conclusion of the appointment at which Mr. Lindsay says he made this remark, he felt he needed clarification of the family physician's notes and the opinion of a specialist. It seems unlikely that he made the statement Mr. Lindsay now attributes to him. In any event, I accept the evidence of Messrs. King and Pickering that Mr. Lindsay did not tell either of them that Dr. Casey had told him there was no reason why he could not return to work.

18. Ken Pickering denied that Mr. Lindsay asked him to file a grievance with respect to his return to work in 1983. Mike King testified that when he knew Mr. Lindsay would soon be seeing Dr. Richter, he suggested to Mr. Lindsay that they file a grievance and did file such a grievance on February 10, 1984. When the letter from Dr. Richter arrived, he and Mr. Pickering spoke to management and suggested there was no excuse for any continued refusal to allow Mr. Lindsay to return to work. By that time, recalls had progressed to the point that Mr. Lindsay's seniority gave him the right to his former job as a fork lift operator. He was returned to that job expeditiously

after providing the letter. Thereafter, Mr. King and the bargaining committee considered whether the company's refusal to return Mr. Lindsay to work before receiving that letter was a violation of the collective agreement.

19. The collective agreement provided that an employee on sick leave "will be returned to work in accordance with his seniority, provided he furnishes satisfactory medical evidence of recovery." Mr. King looked at what arbitrators had had to say about the onus on the employee to establish his/her fitness to return to work. The committee accepted his conclusion that an arbitrator would probably agree with Budd that, given the nature of the original injury and the brevity and inconsistency of the notes Mr. Lindsay got from his general practitioner, it was entitled to something more authoritative before being obliged to return Mr. Lindsay to work. It was common for the company to ask for notes from specialists, and the committee accepted Mr. King's view that the company had acted reasonably in requesting one here. Mr. Lindsay had returned to work. All that remained was the question whether he should have been allowed to return earlier. Having concluded that a grievance over the timing of his return to work was unlikely to succeed at arbitration, the union withdrew it.

20. Section 68 of the *Labour Relations Act* does not require that a trade union carry a grievance through to arbitration merely because the grievor wants it to do so. Unless the collective agreement gives the grievor that right, it is for the union to decide whether or not to take the grievance to arbitration. Section 68 requires the union to make that decision in a manner which is not arbitrary, discriminatory or in bad faith. It does not provide an appeal to the Board from the union's decision. The question for the Board is not whether the union's decision is the one which this Board would have made in the circumstances, it is whether the union's decision is the result of a process of reasoning grounded on a consideration of relevant matters and free from the influence of irrelevant ones: see *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, 6 CLRBR (NS) 134, at paragraphs 36 to 39. The Board has recognized that considerations relevant to a decision whether or not to press a grievance to arbitration include the merits of the grievance, the likelihood of its success, the financial commitment involved in proceeding to arbitration and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the arbitration proceedings and their possible results: see *Catherine Syme*, [1983] OLRB Rep. May 775 at paragraph 20.

21. While I generally accept the evidence of the union and employer witnesses with respect to the events leading up to Mr. Lindsay's return to work, I do so with some doubt that the company's decision that a specialist's note was necessary came as early on as the witnesses now honestly recall. Such doubt is perhaps the inevitable consequence of having to view the events in question at such a distance in time. If it were necessary to resolve that doubt, I would resolve it in the respondent's favour. My doubt relates to the period between late September and early November, during which it has not been established that Mr. Lindsay's seniority entitled him to any job which could accommodate the restrictions outlined in the first two doctor's notes. Even with that doubt, therefore, I am satisfied that it was not unreasonable for the union to conclude that Mr. Lindsay had not discharged his obligation to "furnish satisfactory medical evidence of recovery" until he had provided the letter from Dr. Richter. On the basis of the evidence as it relates to events up to the fall of 1984, I am not persuaded that the union breached section 68 in its handling of that grievance. The subsequent events referred to in evidence do not persuade me otherwise.

22. Mr. Lindsay claimed that two grievances in October 1984 had been mishandled by the union. One was a grievance that his foremen, Messrs. Shelley and Caron, had been consistently harassing and discriminating against him. It asked that they apologize for their actions. The actions complained of were thoroughly discussed in the grievance process. There was an apology by one of

the foremen with respect to at least one of the instances complained of. I believe Mr. King's testimony that at that point Mr. Lindsay seemed satisfied with way that grievance was resolved in the grievance process. Having heard at length about the background to that grievance, the resolution of it appears to me to have been a reasonable one. The other grievance concerned a one day suspension for poor job performance. There was at least one reliable eye witness to Mr. Lindsay's having been sitting on his fork lift reading a newspaper at a time when he was supposed to be taking materials to or from the "blinker" area. That was the poor job performance for which he was suspended. In the grievance process, the union got the suspension reduced to a written warning. It concluded it was unlikely to do better at arbitration, and took no further step. Having heard at length about the incident I can say that was not an unreasonable conclusion. Nothing in what I heard about these October 1984 grievances persuades me that in handling the earlier return to work grievance the union acted in an arbitrary, discriminatory or bad faith fashion.

23. Mr. Lindsay went to see Mr. Pickering in December 1984 to ask for copies of his grievances. The meeting deteriorated into name calling. In the course of this, each expressed a low opinion of the other. Mr. Pickering made reference to an occasion during Mr. Lindsay's absence on sick leave in which Mr. Lindsay supposedly told a steward that he (Lindsay) had no reason to return to work as long as the company was paying him to sit out. Mr. Pickering concedes this may have sounded like an accusation that Mr. Lindsay had been ripping the company off. At one point, each moved toward the other and came into contact in a way which leaves some doubt about which of them was the attacker and which was acting in self defence. It is not for me to answer that question; that was a question to be resolved (if at all) in another forum. The purported relevance of this incident is that it is said to show that the union must have acted in bad faith in handling the return to work grievance a number of months earlier. It certainly shows that Mr. Pickering did not hold Mr. Lindsay in high regard. As this was a result of events which preceded Mr. Lindsay's return to work, it is a fair inference that Mr. Pickering did not hold him in high regard when he was dealing with Mr. Lindsay's return to work grievance. I am not persuaded, however, that Mr. Pickering's personal feelings about Mr. Lindsay caused him to act in an arbitrary, discriminatory or bad faith manner in dealing with that grievance.

24. The member of its executive whom the union allegedly refused to allow to represent Mr. Lindsay in a proceeding before the Workers' Compensation Appeals Tribunal was Peter Viraugh. Mr. Viraugh had no experience of proceedings before that tribunal, and he had a health problem which made it dangerous for him to travel by car. It was for these reasons that when Mr. Lindsay suggested that Mr. Viraugh represent him, the union's officers offered instead to arrange for his representation by an experienced representative from the Office of the Worker Advisor. I believe their evidence that Mr. Lindsay then seemed satisfied with that suggestion, which they carried out.

25. Finally, there is the allegation that the union breached section 68 when it refused to give Mr. Lindsay a copy of the grievance filed on his behalf with respect to his return to work. Mr. King testified that he and others met with Mr. Lindsay in 1984 after the union withdrew his back to work grievance, to explain what had been done. I find that there was such a meeting, that the grievance was discussed and that Mr. Lindsay did not at that time ask for a copy of it. Mr. Lindsay's requests began after that. Requests were made to Wayne Poole who, in turn, made them to Mr. Doherty. Mr. Poole says Mr. Doherty's response was that Mr. Lindsay could not have copies of the grievances because they were the property of the union. Mr. Doherty says he told Mr. Poole that Mr. Lindsay would have to speak to the President of the union if he wanted copies. While some request was made to Mr. Pickering on the occasion of the December 1984 altercation, I am not sure it would have been apparent to Mr. Pickering that Mr. Lindsay was seeking a copy of the 1984 grievance as well as the 1978 one. In any event, Mr. Pickering was not the proper or logical person to

approach for that purpose at that time. While Mr. King was undoubtedly aware of the efforts Mr. Lindsay was making to get copies of grievances, I am not persuaded that any request was made directly to Mr. King by Mr. Lindsay or anyone acting on his behalf.

26. Mr. Lindsay did speak to the local union's President who, as I have already noted, referred him to the Vice-president. The union did not challenge or contradict Mr. Lindsay's testimony that the union's Vice-president, John Diver, told him he could not have a copy of his grievance because it was the property of the union. That occurred some time in 1985. There is no evidence that providing Mr. Lindsay with a copy of the 1984 grievance would have involved any significant effort or expense on the union's part, either at that time or at any other time before or since.

27. After Mr. Diver refused him a copy of the 1984 grievance, Mr. Lindsay had two meetings with union officials to discuss that grievance and other matters. The first meeting was with Mr. King; the second was with Mr. Davidson and various officials of the local including Mr. King. Mr. King had the 1984 grievance with him when he met with Mr. Lindsay to discuss it and his other concerns. Mr. Lindsay admits he was shown the grievance at this meeting and did not ask for a copy of it. He says that at the subsequent meeting, Mr. Davidson asked to see the grievance and was told by Mr. King it was no longer in existence. I am satisfied that what Mr. Davidson was told was that the 1978 grievance was no longer in existence, which was true. Mr. Lindsay did not ask for a copy of the 1984 grievance at the meeting with Mr. Davidson. It is not clear to me what the response would have been if Mr. Lindsay had asked Mr. King or Mr. Davidson for a copy of the 1984 grievance.

28. It is not a great deal to ask of a trade union that it give a worker a copy of a grievance it has filed on his or her behalf if the worker asks for one. At the end of the several months Mr. Lindsay spent trying to get a copy of his grievance, the only reason Mr. Diver gave for refusing him a copy was the officious and irrelevant statement that the original was the property of the union. This high-handed response had a predictable and undesirable effect: it gave Mr. Lindsay the impression the union had something to hide and reinforced his belief that the union's officials were not to be trusted. The union now seems to concede that the sensible thing would have been to give him a copy when he asked for it. It has changed its policy with respect to giving grievors copies of their grievances has changed since this complaint was filed: copies are now provided.

29. I have no difficulty characterizing the union's refusal to give Mr. Lindsay a copy of his grievance as arbitrary action, perhaps even action in bad faith. The refusal is not a breach of section 68, however, unless it can also be characterized as action "in the representation" of Mr. Lindsay as an employee in a bargaining unit which the union is entitled to represent. Counsel for the union argues that any right a worker may have to information about his or her grievance comes to an end when the grievance is withdrawn by the union. He relies on the Board's decision in *Softley Cartage Limited*, [1982] OLRB Rep. May 766. Taken to its logical conclusion, the union's argument is that a union can be as arbitrary as it likes in communicating with employees about employment matters in which the employees are interested, so long as in its actual dealings with their employer about those matters the union does not act in an arbitrary, discriminatory or bad faith manner. The decision in *Softley Cartage Limited*, *supra*, dealt with a specific fact situation; I am persuaded it would not be fair to say that it stands for the unqualified proposition set out in the previous sentence. It seems to be open to the Board to conclude in an appropriate case that a union's refusal to provide a worker it represents with a copy of a grievance it has filed on his or her behalf violates section 68: see *Maurice Berlinguette*, [1984] OLRB Rep. Apr. 568.

30. As a practical matter, however, complaints about a trade union's failure to provide

information about its activities on behalf of employees tend to arise when there are suspicions or allegations that the activities themselves involve a breach of the Act. The refusal of information and the activities to which the information relates come to the Board bound up together as the subject matter of a complaint. The complainant receives the desired information as a result of the filing of that complaint, either before or in the course of a hearing. The propriety of the activities generally becomes the real focus of attention, as it did in this case. If the complaint fails on that issue, the matter of the initial failure of communication can take on an almost academic quality, as it does in this case.

31. If the respondent's refusal to give the complainant a copy of his grievance was a violation of section 68, I am not persuaded that that caused him any loss for which he should be compensated. I cannot say that even the costs to Mr. Lindsay of these proceedings, for which he would not have been compensated even if the complaint was wholly successful (see *Silknit Limited*, [1983] OLRB Rep. Nov. 1913; *Jean Liebman*, [1986] OLRB Rep. June 753, and, *Gerald Lecuyer*, [1987] OLRB Rep. Jan. 72), were caused solely or even primarily by that refusal. I would not consider an award of nominal damages, in view of the complainant's failure to renew his request at the meetings with Mr. King and Mr. Davidson. For that same reason, and also because the union has changed its policy with respect to providing copies of grievance documents, I would not issue a cease and desist direction or other remedy with prospective effect. Having concluded that in these circumstances I would not grant any remedy for such a breach if it was one, it does not appear to me that any useful labour relations purpose would be served by my merely pronouncing on whether or not, in all the circumstances, the union's refusal in 1985 to provide a copy of a grievance amounted to a breach of the Act, so I do not propose to do so.

32. I dismiss this complaint, with the observation that Mr. Lindsay and the respondent trade union would be well advised to put these proceedings behind them without engaging in any further recrimination about what caused them.

2939-88-R Labourers' International Union of North America, Local 1059, Applicant v. Lonco Construction Limited; Caradon Developments Inc., Respondents

Certification - Construction Industry - Membership Evidence - Respondent requesting a hearing to "test" the membership evidence - Any party asserting any irregular or improper conduct is obliged to give notice and full particulars of its allegations - With the exception of particularized allegations of non-sign or non-pay the Board does not conduct investigations into allegations of impropriety with respect to the solicitation of membership evidence - Such allegations must be made, particularized and proven by a party to the proceeding - Board disposing of application without a hearing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

DECISION OF THE BOARD; March 22, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation by the Minister under section 139(1) of the Act on September 30, 1983, the

designated employee bargaining agency is the Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial District Council.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1).

3. As filed, the application specifies two separate entities as respondents. Although the applicant does not specify that it is seeking relief under section 1(4) of the Act as well as certification, such a request is implicit. By letter dated March 15, 1989, however, the applicant seeks to withdraw the application insofar as it relates to Caradon Developments Inc. without prejudice to its right to seek relief under section 1(4) of section 63 at some later date. In the circumstances, including the replies filed by the two respondents, the Board finds it appropriate to grant that request and the application with respect to Caradon Developments Inc. is therefore withdrawn with leave of the Board.

4. In its reply (as amended by letter dated March 7, 1989), the respondent Lonco Construction Limited agrees with the bargaining unit description suggestion by the applicant for this application (as amended by the withdrawal as against Canadian Developments Inc.). It has, however, requested that the Board hold the hearing with respect to the application because it “desires the opportunity to test the membership evidence filed in support of the application” and it “alleges that the membership evidence filed in support of the application does not reflect the wishes of the employees of the bargaining unit with respect to representation by the applicant”.

5. The *Labour Relations Act* provides that the certification of trade unions in this province is based primarily upon an assessment of a trade union’s membership support as evidenced by membership records filed in support of an application for certification. The Board does not inquire into opinions about the virtue of trade union representation except as evidenced by the documentary membership evidence and any timely petitions filed in opposition to the application. The representation vote exists as a mechanism for ascertaining the wishes of bargaining unit employees in cases where an applicant trade union has filed membership evidence on behalf of more than forty-five per cent of such employees but does not have the support (as evidenced by membership documents) of more than fifty-five per cent of them which is required for outright certification under section 7(2) of the Act, or where the circumstances are such that the Board sees fit to exercise its discretion to require such a vote to be held notwithstanding that there is documentary evidence showing membership support for the applicant trade union in excess of fifty-five per cent. In certification proceedings the Board places heavy reliance upon membership evidence filed by the trade union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which is not (normally) disclosed to the employer and is not (normally) subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of the membership evidence filed. It is for an applicant trade union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered and that each employee has paid the initiation fee that accompanies it. For this purpose, the Board requires that a Declaration Concerning Membership Documents (in Form 9 or Form 80 as the case may be) be filed in every application for certification.

6. Any party which asserts, in any proceeding before the Board, any irregular or improper conduct is obliged to give notice and full particulars of its allegations (section 72 of the Board’s Rules of Procedure and see, among others, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138). This requirement has a basis in both legal and labour relations considerations. The legal consideration is a recognition of the rule of natural justice that a party against which allegations of wrongdoing are made is entitled to have sufficient notice of them to enable it to know and

prepare the case that it must meet. The labour relations consideration is that labour relations delayed are labour relations defeated and denied and that there should therefore be no unnecessary prejudicial delay in proceedings before the Board (see *Pebrá Peterborough Inc.*, [1987] OLRB Rep. March 421; *Unlimited Textures*, *supra*).

7. Where a party has information that the trade union, or anyone on its behalf, has either attempted to perpetrate a fraud on the Board with respect to the membership evidence, or has otherwise acted improperly, that party can make those allegations. With the exception of allegations, which must also be particularized, that membership evidence is defective because the employee with respect to whom it is submitted did not actually sign the card or did not make the payment referred to in it, the Board does not conduct investigations into allegations of impropriety with respect to the solicitation of membership evidence. Such allegations must be made, particularized and proven by a party to the proceeding.

8. Further, other than at a hearing that the Board finds it appropriate to hold with respect to “non-sign” or “non-pay” allegations, a party (other than the applicant trade union) is not permitted to either inspect or examine witnesses with respect to membership evidence filed in support of an application for certification. This practice is founded in section 111(1) of the *Labour Relations Act*, which provides that:

111.-(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

The processes which the Board has adopted with respect to membership evidence have stood the test of time and have been shown to be reliable (see *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223).

9. In addition, the construction industry provisions of the *Labour Relations Act* generally, and specifically section 102(14), together with the Board’s Rules of Procedure with respect to applications for certification in the construction industry, enable the Board to deal with such applications in an expedited manner without an oral hearing. Accordingly, unless there is something on the face of the material before the Board which suggest that a hearing is necessary, or a party offers some cogent reason for holding one, the Board will dispose of an application for certification in the construction industry without holding an oral hearing.

10. In this application, the respondent Lonco Construction Limited has offered no basis whatsoever for either its request or its allegation. There is nothing in any of the material before the Board which suggests any need for a hearing at this time.

11. The Board finds, pursuant to section 144(1) of the Act that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. However, the material before the Board is such that it cannot make the other determi-

nations necessary in order to dispose of the application at this time. In that respect, the Board finds it appropriate to authorize a Labour Relations Officer, to be designated by the Registrar, to inquire into and report to the Board with respect to the list of employees in the bargaining unit.

2276-88-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. Pioneer Mechanical Limited, Respondent

Certification - Trade Union - Trade Union Status - Whether applicant entitled to the benefit of the presumption of trade union status in s.105 - Board is concerned with differences of substance between a "label" which has been found to identify a union and the label used by the applicant for certification - Board will not concern itself with minor mistakes in the naming of an applicant for certification - Applicant entitled to benefit of presumption in s.105 - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Neil Meikle* and *Vince McNeil* for the applicant; *Abul Syed* for the respondent.

DECISION OF THE BOARD; March 14, 1989

1. This application came on for hearing on March 10, 1989 for the purpose of hearing the evidence and representations of the parties with respect to "the description and composition of the bargaining unit". In addition, by letter dated January 3, 1989, the Registrar advised the applicant that the Board's trade union status records revealed that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada - Local Union 46 was previously found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, but that the applicant, that is, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 had not. The differences between two "labels" are that the words "Pipe Fitting" appear in the former but the single word "Pipefitting" appears in the latter, and a dash separates the words "Canada" and "Local" in the former, while a comma is used to separate those words in the latter. The Board disposed of this application orally at the hearing.

2. At the hearing, the respondent quite rightly did not suggest that the applicant was not a trade union. The Board has previously stated, at paragraph 6 of *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517, that:

... Section 105 of the *Labour Relations Act* sets up a rebuttable evidentiary presumption of trade union status for organizations that the Board has previously found to be a trade union. Because of the nature of that provision, an applicant in certification proceedings is not entitled to the benefit thereof unless its name is identical to that which the Board has previously found to be a trade union. Even a relatively minor difference in name may reflect that an applicant with a name "similar to" or even "substantially the same as" that of an organization previously found to be a trade union is either an entirely different entity or that it has undergone some change which may result in it being a trade union no longer. It was therefore the view of the majority that the applicant in this proceeding is not entitled to the benefit of section 105 of the Act and that it was necessary for it to establish its status as a trade union independently.

At paragraph 20, the Board also commented that:

... Although there are practical reasons, including the speed at which matters are processed by the Board, why a trade union might not want to be known by any name other than its legal name, there is no reason in law why it cannot carry on business under a name other than that legal name, so long as it does not do so for any improper purpose....

3. The Board's comments in *Hartley Gibson Company Limited*, *sypra*, should neither be taken out of context, nor applied without regard to the rationale for sections 104 and 105 of the *Labour Relations Act*; that is, that certification proceedings, which are supposed to be expeditious, do not become bogged down over matters which do not reveal any concern of substance. The Board is concerned with the label used by a trade union to identify itself to the extent that it adequately identifies it as such. For purposes of the provisions of section 105 of the *Labour Relations Act*, the label used by an applicant for certification must adequately identify it as an entity which the Board has previously found to be a trade union. In that regard, the Board will generally be concerned only with differences of substance between a label which has been found to identify a trade union (within the meaning of section 1(1)(p) of the Act) and the label used by an applicant for certification. Consequently, in the absence of an allegation that it is of some real significance, the Board will not normally concern itself with differences in punctuation, like the use of a comma instead of a dash (or, for example, an "&" instead of the word "and") which are no more than different ways to accomplish the same end; that is, to separate parts of a sentence or label. Nor, in the absence of specific allegations, will the Board be concerned with obvious *bona fide* minor mistakes in the naming of an applicant for certification (see section 104 of the Act), or different presentations of what is obviously the same thing, like, for example, use of the word "Pipefitting" instead of the words "Pipe Fitting". In our view, it would be unnecessarily technical and a waste of time and resources to do otherwise. In this case, there is no difference of substance between the two labels in question.

4. Further, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, the applicant herein, has previously been found to be a trade union in many, many prior proceedings before the Board.

5. In the result, and there being absolutely no suggestion why it should not be, the Board was satisfied that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada - Local 46 is the same as the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, and that the applicant is entitled to the benefit of the presumption in section 105 of the Act.

6. The Board therefore found that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of the designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) of the Act on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. The Registrar is directed to ensure that the Board's trade union status records are amended accordingly.

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[Remainder of decision omitted: Editor]

0853-85-M International Brotherhood of Electrical Workers Local 353, Applicant v. The Municipality of Metropolitan Toronto, Respondent v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervener

Collective Agreement - Construction Industry - Construction Industry Grievance - Employer - Grievance alleging that Metro breached the collective agreement by contracting for the performance of electrical work with a contractor who was not a party to a collective agreement with the IBEW - Respondent Metro arguing it was not an "employer" in the construction industry but an owner and therefore not bound by the collective agreement - Board rejecting proposition that it is bound to consider whether the respondent to a reference to arbitration was acting as a person operating a business in the construction industry in respect of the subject matter of the grievance - Only issue is whether respondent's activities have violated the provincial agreement - Metro did not "sublet" work because it did not award a secondary contract -Grievance dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. H. Wightman* and *C. A. Ballentine*.

APPEARANCES: *B. Fishbein* and *Michael Lloyd* for the applicant; *H. A. Beresford*, *R. J. Atkinson* and *D. A. Brown* for the respondent; *S. C. Bernardo* and *Eryl Roberts* for the intervener.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN;
March 3, 1989

1. Pursuant to section 124 of the *Labour Relations Act* ("the Act"), the International Brotherhood of Electrical Workers, Local 353 ("the Union") has referred to this Board for arbitration its grievance that in October 1984 the Municipality of Metropolitan Toronto ("Metro") breached the collective agreement by which they were then bound by contracting for the performance of electrical work with a contractor who was not party to a collective agreement with the IBEW or any of its Locals. Certain basic facts are not in dispute.

2. In July 1984, the Union was certified as exclusive bargaining agent for electricians and electricians' apprentices employed by Metro in two units as contemplated by subsection 144(2) of the Act. This had the result, the parties agree, that "both the Union and the Municipality became bound by the Provincial Agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario ..., which Agreement was effective on May 4, 1984 and is to expire on April 30, 1986." That agreement ("the provincial agreement") is a provincial agreement within the meaning of clause 137(1)(e) of the Act covering employment of electricians and electricians' apprentices in the industrial, commercial and institutional ("ICI") sector of the construction industry. Section 5.05 of that agreement ("the subcontracting clause") provides:

The Company shall not directly or indirectly sublet any work under the jurisdiction of this Agreement to any other Employer or Employee who is not a party to an IBEW Construction Agreement nor require any employee to work on a piecework basis.

3. In October 1984, following a public call for tenders, Metro entered into a contract with Torontario Mechanical and Electrical Company Limited ("Torontario" or "the contractor") for the performance of modifications to firing ranges at 2 District and 3 District Headquarters of the Metropolitan Toronto Police. Of the \$327,700.00 contract price, \$33,500.00 was for electrical work which the parties agree fell within the ICI sector of the construction industry. Torontario's employees performed that work. Torontario is not party to the provincial agreement. At all times material

to this dispute, the Union was ready, willing and able to supply workers to perform the subject electrical work, and contractors party to the provincial agreement were available to perform that work.

4. The respondent argues that it has not breached the provincial agreement because

- 1) In these circumstances, and for the purpose of all [of its] capital works budget construction, the Respondent is not an "employer" in the Construction industry within the meaning of section 117(c) of the *Labour Relations Act*. Rather, the Respondent is an owner when acting in this capacity and is therefore not bound by the provisions of the provincial collective agreement, including the subcontracting clause; and
- 2) In any event, the work in this case was not "sublet" within the meaning of Article 505 of the provincial collective agreement.

Both positions were thoroughly addressed in argument. The respondent specifically asked that we rule on the first of these arguments even if it succeeds on the second.

5. The parties agree on the truth of the following assertions, without agreeing on their relevance:

10. The Toronto contract emanated from and was administered by the Parks and Property Department of the Municipality ("the P & P Department").

11. Construction work for the P & P Department is carried out under either the capital works budget or the operating budget of the P & P Department.

12. All capital works construction associated with the Metropolitan Parks, the Metropolitan Zoo, the Metropolitan Police Force and the Department of Ambulance Services falls under the capital works budget of the P & P Department.

13. All construction work falling under the capital works budget of the P & P Department is awarded to outside contractors through the use of a public tendering process. Much of this work consists of large-scale projects which are financed by long-term debentures. Each capital works project has a consultant who is either an architect or design engineer engaged by contract, and it is usually an architect.

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15. The Toronto contract was awarded under the P & P Department's capital works budget....

16. Construction, renovation and repair work is also performed under the P & P Department's operating budget.

17. Some construction, renovation and repair work falling under the P & P Department's operating budget is performed by employees of the P & P Department.... in 1985, the P & P Department employed 2 electricians, 3 carpenters, 1 plasterer, 1 tilesetter and 6 painters. The 2 electricians have worked steadily for the Municipality for the last number of years.

18. The P & P Department also engages contractors to perform construction, renovation and repair work falling under the P & P Department's operating budget. The work of these outside contractors is arranged either through a purchase order which is drawn up following the completion of a limited tendering process which is by invitation from a list of qualified contractors or, in rare cases, through the public tendering process.

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20. All contracts in respect of all construction work performed by outside contractors for the Municipality, including

the P & P Department, regardless of whether the work falls under the capital works budget or the operating budget, provide that the rate of wages for workers:

“shall be no less than the rate set out in the Schedule of Wage Rates from time to time filed by the Fair Wage Officer in the office of the Clerk of the Metropolitan corporation after being first approved by the Metropolitan Executive Committee of the Metropolitan Council.”

(Article 39(B) (ii)(b), General Conditions, Exhibit 3).

6. Over the course of seven hearing days we heard the testimony of several witnesses called by the respondent with respect to various matters including

- a) the contract between Metro and Chisholm, Fleming and Associates under which the latter, a consulting engineering firm, designed the firing range improvements, prepared tender documents, reviewed and made recommendations on tenders received, arranged for plan approvals and construction permits, inspected and reported to Metro on Toronto's work as it proceeded, reviewed and certified the accuracy of Toronto's periodic progress claims;
- b) the function performed on behalf of Metro by the Fair Wage officer, both generally and in respect of the contract between Toronto and Metro;
- c) the function performed by a Metro employee, Mr. D'Albuquerque, as “project supervisor” with respect to the firing range improvements; and
- d) Metro's dealings with the Electrical Trade Bargaining Agency (“the ETBA”) and other participants in province-wide bargaining in the ICI sector of the construction industry.

The first of the two defences recited in paragraph 4 and the alleged relevance of the evidence referred to in this and the immediately preceding paragraph arise out of three prior decisions of the Board: *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300 (“*Kapuskasing #2*”); *Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349 (“*Brant #1*”); and *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187 (“*Brant #2*”). It would be useful to review those decisions before dealing with the parties' arguments in this case.

7. In 1972, the Kapuskasing Board of Education directly employed certain carpenters in the construction of a swimming pool. The United Brotherhood and Joiners of America (“the carpenters' union”) applied under the construction industry provisions of the Act for certification as exclusive bargaining agent for carpenters and carpenters' apprentices employed by the school board. The Board granted the application, rejecting the argument of the school board that it was not a “person who operates a business in the construction industry” within the meaning of what is now clause 117(c) of the Act: *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587 (“*Kapuskasing #1*”). When the province-wide bargaining provisions of the Act later came into force, the school board became bound by successive provincial agreements governing employment of carpenters in the ICI sector.

8. *Kapuskasing #2* dealt with a grievance by Local 1669 of the carpenters' union that the school board had breached the provincial agreement then in force by awarding a contract for the construction of a school addition to a contractor who was not bound by the provincial agreement. The relevant article of that agreement provided that:

4.01 Any work that is the work of the Union under the provisions of Article 19 of this Agreement shall only be sub-contracted to an employer bound by this agreement.

9. The Board recited and dealt with the issues in these three paragraphs:

4. The applicant contends that by awarding the contract for the school addition to Hembruff and Dambrowitz, the respondent violated article 4.01 of the Provincial agreement. The respondent, however, takes the position that it cannot be bound by the terms of the Provincial agreement since, with respect to this particular project, it was acting only in its capacity as a school board and not as an employer in the construction industry. The respondent took great care to distinguish the facts at hand from those in an earlier proceeding (*Kapuskasing Board of Education*, [1972] OLRB Rep. June 587), wherein the Board found it to be an employer in the construction industry. In that case, the respondent had acted as its own general contractor in the construction of a swimming pool and had also directly employed certain carpenters working on the project.

5. In that the respondent is not directly employing any labour on the school project, and is also not acting as its own general contractor, we are of the view that it is not at the current time an employer in the construction industry. Instead, its status is that of an owner who has let a contract for an entire project to a general contractor. It may well be that an owner can be obligated by the provisions of a collective agreement to let out contracts only to general contractors in contractual relations with a particular trade union. However, the language in article 4.01 of the agreement before us does not contain such a restriction. Article 4.01 has reference only to the subcontracting out of work. Subcontracting involves the awarding of a secondary contract, whereby a subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor. In the instant case, the respondent, in its capacity as an owner, has let a primary contract to a general contractor. The general contractor has, in turn, subcontracted certain of the work to other employers.

6. In that the respondent has only let a primary contract to a general contractor, and has not itself subcontracted out any work, we are of the view that its actions do not come within the purview of article 4.01. The grievance is accordingly dismissed.

10. The trade union applicant in *Brant #1*, Local 9 of the International Union of Bricklayers and Allied Craftsmen ("the bricklayers' union"), had been certified in August 1983 as exclusive bargaining agent of bricklayers and bricklayers' apprentices employed by the Brant County Board of Education. In December 1983 it referred to arbitration a grievance that the school board had in the meantime violated Article 1(c) of the bricklayers' provincial agreement by awarding a contract for masonry work to a contractor not bound by that agreement. The respondent admitted that it had become bound by the bricklayers' provincial agreement when the union was certified. It apparently argued that by the time it made the impugned contract it was no longer an "employer in the construction industry". The majority decision dealt with that argument this way:

11. The threshold issue that must be determined is whether the respondent was acting as an "employer" in this case. Section 145(4) establishes that an "employer" in this sector of the construction industry is bound by the provincial agreement by virtue of certification or voluntary organization:

145.-(4) After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bar-

gaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employees in which the employer would have been included.

An “employer” in the construction industry is defined in section 117(c) as:

“employer” means a person *who operates a business in the construction industry*, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts; [emphasis added]

Therefore only an “employer” within the meaning of section 117(c) of the Act can be bound by the provincial agreement and article 1(c) in particular. Therefore, to be an employer in the construction industry, one must be operating a business in the construction industry. This Board has made it clear that an entity need not be primarily engaged in construction to be considered to operate in the construction industry. Thus, certificates were issued in the cases of *Tops Marina, supra, Kapuskasing 1, supra, City of Toronto, supra, and Municipality of Metropolitan Toronto, supra*. In addition, the Union was issued a certificate for the employees of this respondent and the Board considered that it was engaged in construction although construction was not its primary activity.

12. However, having once been recognized as an employer operating a business in the construction industry, does the respondent forever maintain that characterization? It certainly does not do so automatically. Depending on the nature of projects undertaken and one’s involvement in those projects, an entity can change from being the operator of a business in the construction industry and thus an “employer”, to be simply being an “owner” of property who purchase [sic] construction or masonry services. But on the basis of the evidence before this Board, we are bound to conclude that when engaged on the project in question the respondent must still be considered to be operating a business in the construction industry and thus, an employer bound by the provincial agreement. The facts put before this Board established that the respondent was certified in the summer of 1983 as an employer who was bound by the Provincial Agreement between the applicant and the Masonry Industry Employers’ Council of Ontario. Thus, it was recognized that as of that time, the respondent was operating a business in the construction industry. A short time later, the respondent let out a contract for the work that is now in question was to have masonry work performed on a building owned by the respondent. It is clear that this work falls within the scope of the provincial agreement and is construction or masonry work. Thus, the respondent must be viewed as continuing to be engaged in the operation of the construction business by its contracting for the performance of masonry work. While the onus is upon the union, the weight of this evidence combines to persuade the Board, on the balance, that the respondent continues to be operating a business in the construction industry and was engaged in a project regarding work covered by the provincial agreement.

13. This evidentiary conclusion is to be distinguished from the situation where evidence can establish that an entity has changed its status from being an employer because it is operating a business in the construction industry to becoming simply an owner of property who is purchasing construction skills or services. That was the situation in the *Kapuskasing 2* case where the Board of Education was found to have become an “owner” rather than an “employer” within the meaning of the collective agreement. This distinction could be established, *inter alia*, by evidence regarding the nature of work being done, the respondent’s degree of control over the project, the work, the materials and the manpower as well as its participation, if any, in the project in question. However, on the basis of the facts before this Board, we find it reasonable to conclude that the respondent was acting as an “employer” in that it was operating a business in the construction industry at all material times.

11. In *Brant #2*, the Board had before it three subsequent grievances by the bricklayers’ union, each alleging a violation by the Brant County Board of Education of the clause of the bricklayers’ provincial agreement which was considered in *Brant #1*. The panel rejected the trade union’s argument that the applicability of that clause to the activities of the respondent was *res*

judicata as a result of the decision in *Brant #1*. After reciting paragraphs 12 and 13 of the *Brant #1* decision, the panel noted that

On the facts of the present case the respondent now seeks to show that it is no longer in the construction industry.

It went on to deal with the issues this way:

5. The problem raised in the present case is considerably more difficult than the problem in a certification case where the application for certification is brought pursuant to the construction industry provisions of the *Labour Relations Act*. In such certification cases, the employer has employees performing work that is normally work considered in the construction industry and, therefore, a conclusion that the person is operating a business in the construction industry flows from the finding that the person actually has employees in the construction industry. Consequently, the focus of many of the certification cases is whether having employees engaged in construction constitutes the operation of a business in the construction industry. The present case raises the problem that the employer does not have employees, but if it is operating a business in the construction industry, the respondent is caught by the subcontracting clause in the collective agreement between the employer and the trade union.

6. The very origin of the subcontracting clause is to prevent an employer bound by a collective agreement from avoiding that collective agreement by contracting out the work rather than performing the work with its own employees. Such clauses have been regarded by this Board (see *The Metropolitan Toronto Apartment Builders Association* [1978] OLRB Rep. Re. Nov. 1022) as valid "union security" provisions in that they attempt to protect a legitimate concern of the trade union, i.e. rendering bargaining rights meaningless by subcontracting. The impact of the clause then is to say to the employer "you don't have any employees in the construction industry but you ought to have our members working on the job and therefore you have violated our collective agreement." Almost by definition then, it will be seen that in subcontracting cases, such as the present, there is no employment relationship to place the respondent in the construction industry.

7. From the employer's point of view, the result would seem to be that once having engaged in the construction industry and having been certified by a trade union such as the applicant trade union, the employer is bound by the subcontracting clause, particularly in relation to the industrial, commercial and institutional sector of the construction industry until such time as a successful termination application is brought by employees. Further, the subcontracting clause will be in effect so that even though the employer may wish to contract out the work the scope of contractual arrangements that can be made is limited to those contractual relations which comply with the subcontracting clause in the collective agreement. In the previous decision by this Board, the comment was made that the employer was bound by the subcontracting clause only where the employer was an employer operating a business in the construction industry and thus bound by operation of the *Labour Relations Act* to the provincial agreement between the trade union and the relevant employer bargaining agency. The question which arises in the present case thus becomes; can an employer, bound by a provincial agreement, *purchase* construction outside the scope of the subcontracting clause, that is, can the employer act as a *purchaser only* and not as a person operating a business in the construction industry?

8. We are of the view that this may be possible, but there are no clear cut simple criteria, which exists [sic] to delineate when a person is simply purchasing construction and not operating a business in the construction industry.

9. In paragraph 13 of its previous decision, the Board suggested some directions which might be explored in order to develop a distinction between "owner" or "purchaser" and employer. In the present case there is an example of one such criteria which might be a valuable method for determining whether or not a purchaser, when purchasing construction, is or is not engaged in a business in the construction industry. We would suggest that the amount of control exercised by the purchaser can frequently be used to determine whether or not that purchaser is operating a business within the construction industry and, thus, bound by a subcontracting clause. On the one hand, there are situations where a purchaser of a certain construction has the undertaking

designed and drawn by a third party, for instance, an architect or engineer, and the purchaser then puts the matter up for public tender and has the third party architect or engineer supervise and control the construction. The purchaser may take the position that as a purchaser there is no control by the purchaser over the construction job site. That is, the totality of the construction is totally in the hands of other entities and the purchaser is no more in the construction industry than, for instance, the purchaser of an automobile is engaged in the automobile manufacturing industry.

10. However, few purchasers of construction are prepared to be that totally isolated from the construction work that they are purchasing. Thus, on the other hand, if the purchaser wants to retain control of the job site or to retain control over the quality of the construction work performed, then that purchaser is a very real entity on the job site and can be said to be engaging in a business in the construction industry by virtue of exercising that control.

11. For example, many of the larger and frequent purchasers of construction have their own staff who are assigned tasks on the construction work site. Some tasks relate to the quality of the work, the cost of the work or in some cases the labour relations on the total job site. It is impossible to say that such a purchaser of construction with a presence on the job site (indeed frequently exercising indirect but very real control over the job site) is not engaging in the construction business notwithstanding the fact that that may not be the primary business of the purchaser.

12. The facts in the present grievances are themselves a very interesting example of this kind of control over the job site. The major grievance we are concerned with involves certain brick work in relation to a historic building and the respondent Board of Education hired a person on its staff with a background in masonry restoration. And indeed, in reviewing the bidders on the job, the evidence is that Mr. Saldarelli, specifically rejected certain bids as potentially doing very real damage to this historic site because of the contractor's lack of competence. At that point, the respondent cannot be said to be simply a purchaser of construction. The respondent is making a business decision about the contractor that will do the work which is essentially a business decision frequently made by contractors and is thus engaging in a business in the construction industry. In all three of the grievances before us, the role played by the respondent Board of Education was such that they exercised enough control to be engaged in the construction that was the subject of these grievances.

13. In conclusion therefore the three grievances are allowed....

12. Against the background of *Kapuskasing #2*, *Brant #1* and *Brant #2*, the respondent argues that a distinction must be made between someone who is acting as an "employer in the construction industry" and someone acting as an "owner", such that no one can be bound by a construction industry collective agreement in respect of a purchase of construction services when and to the extent they are acting in the latter category. One of the premises on which the respondent founds this argument is that it would have been unreasonable for the Legislature to have expected that the employer bargaining agencies established under the province-wide bargaining provisions of the Act, agencies which the respondent characterizes as dominated by sellers of construction services, could effectively represent both sellers and purchasers of construction services in collective bargaining. It follows, counsel for the respondent submits, that the Legislature must never have intended that the construction industry provisions of the Act would apply to entities acting as "owners" and that those provision should therefore be interpreted accordingly. The distinctions contemplated in the Board's decisions in *Kapuskasing #2*, *Brant #1* and *Brant #2* are consistent with this view, he says, but ought to be taken farther than is contemplated in *Brant #2* because any prudent purchaser of construction services would fail the "control test" expressed in that decision merely by taking reasonable steps to protect its interest as purchaser.

13. Metro concedes that it is bound by the terms of the Provincial agreement with respect to its direct employment of electricians to perform construction work in the ICI sector. It concedes that a suitably worded "contracting out" provision could be applicable to any arrangement under

which it contracted for the performance of ICI construction work on small projects of the sort which have been performed in the past by direct employees of Metro, but says that projects paid for out of its capital works budget, like the subject project, are not of that sort. Metro is not an "employer in the construction industry" with respect to this project, it argues, because the relevant control of the project is in the hands of consulting engineers and not in Metro's hands directly.

14. Before considering the peculiarities of its construction industry provisions, we think it would be useful to review certain basic features of the scheme of the *Labour Relations Act*.

15. A trade union may apply under the Act for certification as exclusive bargaining agent for a bargaining unit of employees of a particular employer. Success in that application depends on establishing that there are at least two such "employees" and that a majority of those employees favour representation by the trade union. Once the trade union is certified as bargaining agent for a defined bargaining unit of employees of an employer, the trade union and the employer are parties to a collective bargaining relationship in which at any given time they are subject either to a duty to bargain for a first collective agreement or to the terms of an existing collective agreement or to a duty to bargain for the renewal of a collective agreement. This collective bargaining relationship continues unless and until one of the parties ceases to exist or the trade union abandons its bargaining rights or those bargaining rights are terminated as a result of some proceeding under the *Labour Relations Act*. Unless one of those events occurs, that collective bargaining relationship continues even when there are no persons employed in the bargaining unit for which the trade union has bargaining rights. The employer party may cease operations yet still be bound by the terms of a collective agreement or by an obligation to negotiate a collective agreement.

16. The right to act as exclusive bargaining agent of all employees of an employer in a defined bargaining unit is the right to represent all those who may be employed in that unit from time to time, not just those employed in the unit at the time that right is acquired. The employer party cannot unilaterally bring that right to an end by ceasing to employ anyone in that unit for a period of time.

17. Clause 1(1)(e) of the Act defines "collective agreement" as

... an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges, or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

As we have already noted, a collective agreement continues to be binding on the parties to it even if there are no employees in the bargaining unit to which it relates. It could not seriously be argued that the agreement would lose its character as a "collective agreement" because the employer party had ceased to employ anyone and, thus, had ceased to be an "employer". "Employer" is a label used to identify a party with whom a trade union has a collective bargaining relationship. That label applies so long as the collective bargaining relationship exists, even at times when that party does not employ anyone and, so, might not be described as an "employer".

18. Provisions specifically dealing with the construction industry were first added to the Act in 1962. They defined "employer" and "trade union" this way:

"employer" means a person who operates a business in the construction industry;

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“trade union” means a trade union that according to established trade union practice pertains to the construction industry.

Apart from the addition to the definition of “employer” of language covering applications for accreditation, these definitions have not since changed, and now appear as clauses (c) and (f) of section 117 of the Act.

19. The meaning of “employer” in the context of a certification application in the construction industry has been the subject of numerous decisions since construction industry provisions first appeared in the *Labour Relations Act* in 1962. The thrust of those decisions is reflected in the following extract from *The Kinsman Club of Leamington*, [1983] OLRB Rep. Nov. 1850 at paragraph 17:

The definition of “employer” in what is now section 117(c) of the *Labour Relations Act* has been examined in numerous decisions of this Board, including: *Tops Marina Motor Hotel*, *supra*, *Kanadia Niagara Falls Limited*, [1966] OLRB Rep. April 9; *Automatic Fuels Limited*, [1966] OLRB Rep. April 22, *Tricont Projects Limited*, [1966] OLRB Rep. May 121, *Hareb Development Limited*, [1968] OLRB Rep. May 181, *Loblaw Groceries Co. Limited*, [1969] OLRB Rep. June 392, *Mattagami Lake Mines Limited*, [1970] OLRB Rep. Feb. 1356, *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587, *Ameri-Cana Motel Ltd.*, [1972] OLRB Rep. Dec. 997, *Group Thirty-Three Limited*, [1974] OLRB Rep. Dec. 888, *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 145 (Judicial review denied sub. nom. *Re City of Toronto and Carpenters’ District Council of Toronto and Vicinity*, 1980, 27 O.R. (2d) at 673), *258167 Vending Company Limited*, [1979] OLRB Rep. June 595, *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62 (Judicial review denied, Ontario Divisional Court, January 29, 1981 (unreported)), *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831; and *City of Kitchener*, [1983] OLRB Rep. Sept. 1490. These decisions establish that a person may be an “employer” within the meaning of section 117(c) even though its primary “business” is not in the construction industry, it does construction work only for its own benefit and not for others, and the project active at the date of the application is the only construction project in which it has ever engaged or ever intends to engage. A person may also fall within the S. 117(c) definition of employer even though it does not engage in construction or any other business with a view to or hope of making a profit. In effect, the Board asks whether the putative employer was engaged in construction activity at the date of the application, and broadly interprets the phrase “operates a business” as describing the state of being busily engaged in an activity (see *Re City of Toronto and Carpenters’ District Council of Toronto and Vicinity*, *supra*, at page 674). Thus, a non-profit entity such as a board of education or municipal corporation may be an “employer” within the meaning of section 117(c) if it acts as its own contractor in building a swimming pool (*Kapuskasing Board of Education*, *supra*) engages carpenters to do restoration and remodeling (*City of Toronto*, *supra*, *The Municipality of Metropolitan Toronto*, *supra*) engages plumbers to do repair work (*The Board of Education for the City of Windsor*, *supra*) or employs bricklayers to erect partitions and walls in public buildings (*City of Kitchener*, *supra*).

As this passage indicates, municipalities and other public authorities have repeatedly and unsuccessfully argued that the definition of “employer” in clause 117(c) cannot apply to them. The Board has taken the same approach to interpretation of the word “business” in clause 117(c) of the Act as did the Supreme Court of Canada (in a somewhat different context) in *Canada Labour Relations Board v. City of Yellowknife*, [1977] 2 S.C.R. 729 where, at page 738, Mr. Justice Pigeon said that:

...“business” has been said to mean “almost anything which is an occupation, as distinguished from a pleasure - anything which is an occupation or duty which requires attention...” (per Lindley, L.J. in *Rolls v. Miller*, at p. 88). There is no doubt that the word “business” is often applied to operations carried on without an expectation of profit. In my view, it would be contrary to the whole concept of classifying employees for jurisdictional purposes by reference to the character of the operation, to attempt to make a distinction depending upon whether the employer is a private company or a public authority...

20. The phrase “person who operates a business in the construction industry” has not been confined in application to vendors of construction services. In the final analysis, any person who employs workers to perform construction work has been treated as an employer in the construction industry for the purpose of applications for certification under the construction industry provisions of the *Labour Relations Act*.

21. Just as it does under the general provisions of the Act, certification under the construction industry provisions creates a collective bargaining relationship between the applicant trade union and the respondent “employer”. Likewise, the continuation of that collective bargaining relationship is not contingent on the employer’s continued employment of workers to perform construction work. No doubt because the situation with which it deals is more common in the construction industry than elsewhere, the prospect of an employer’s having no employees in the bargaining unit for which a trade union has bargaining rights is specifically addressed in section 121 of the Act, which provides that

An agreement in writing between an employer or employers’ organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employers’ organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.

22. Even if it would not otherwise have been so, the language of section 121 makes it clear that a person in a construction industry collective bargaining relationship with a trade union need not continue to be an “employer” in the ordinary sense in order to have continuing rights and obligations as an “employer” in the sense in which that word is used in the construction industry provisions of the *Labour Relations Act*. It seems well settled that someone may be an employer for purposes of collective bargaining and labour relationships under resulting collective agreements even if that person would not have the rights and obligations of an employer under the common law of master and servant: *International Longshoremen’s Association, Local 273 et al. v. Maritime Employers’ Association et al.*, [1979] 1 SCR 120, 89 D.L.R. (3d) 289 (S.C.C.) at pages 1 to 6-7 (S.C.R.), 293-4 (D.L.R.). Counsel for the respondent agrees that the question whether it directly employs electricians on the subject construction project or any other contemporaneous construction project is irrelevant to the question whether the terms of the applicable collective agreement may be brought to bear on its activities. On the respondent’s view, the provisions of the collective agreement are applicable to it even if it does not directly employ electricians, but only when and to the extent that it is in other respects an “employer in the construction industry”.

23. The question whether Metro was both “an employer” in the literal sense and “a person who operates a business in the construction industry” in the sense intended by clause 117(c) of the Act was undoubtedly a relevant question when the trade union made its application for certification. It would undoubtedly be a relevant question if and when another trade union applied under the construction industry provisions for certification with respect to employees of Metro. Why, though, should it be a question of any significance during the currency of the collective bargaining relationship which results from certification, except to the extent that a resulting collective agreement makes the question or any aspect of it relevant? The collective bargaining relationship which results from certification is one concerned not only with existing employment but also with future employment. The “employer” party to that relationship is so labelled not only because it was an employer in the ordinary sense at the time the relationship arose but also because in future, and from time to time, it may be an employer of persons in respect of whose employment the trade union has thus a recognized interest. Once a trade union has been certified as the exclusive bar-

gaining agent for workers employed by an “employer” and the trade union and “employer” have entered into a collective agreement, one would have thought that the applicability of the collective agreement to any particular situation would thereafter be determined by the terms to which the parties had agreed.

24. The thrust of the respondent’s argument, however, is that by defining “employer” as “a person who operates a business in the construction industry”, the Legislature created a statutory limitation on the circumstances in which or to which such a collective agreement can apply. The Legislature’s motivation in imposing this statutory limitation, the respondent argued, is that employer bargaining agencies dominated by vendors of construction services should not be put in a position of bargaining with respect to the rights and obligations of those who function solely as purchasers of such services. There are a number of weaknesses in this argument. One weakness becomes apparent upon examining the statutory history of the provisions in question.

25. The language on which the respondent relies was adopted by the Legislature in 1962, when the first construction industry provisions were introduced into the Act. At that point, an employer for whose employees a construction trade union held bargaining rights could not become bound by a collective agreement other than one agreed to by it or by an employers’ organization which it had expressly or impliedly authorized to act for it in collective bargaining. That only changed in 1970, with the addition of the accreditation provisions in what are now sections 125 to 134. The province-wide bargaining provisions, under which employers are bound by agreements negotiated by employer bargaining agents with respect to the ICI sector of the construction industry, were first introduced into the Act in 1978. Whatever else may have been the reason why the Legislature defined “employer” as “a person who operates a business in the construction industry” in 1962, it could not have been to deal with any supposed conflict of interest created by province-wide bargaining in the ICI sector.

26. Subsection 145(4) speaks directly to the applicability of a provincial agreement:

After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

Section 117 begins with the words “In this section and in sections 118 to 136...”. It does not apply to section 145. Even if this is regarded as an oversight rather than deliberate, it leaves no room for any reasonable belief that the Legislature was counting on the old language in 117(c) to have a new limiting effect with respect to the scope of collective agreements negotiated under the province-wide bargaining provisions.

27. We do not understand the Legislature’s use of the word “employer” in subsection 145(4) to be a means by which it has in some way restricted the potential scope of provincial collective agreements. The word “employer” is simply a convenient means by which to identify a person for whose employees an affiliated bargaining agent has obtained bargaining rights. If the respondent to a referral to arbitration under section 124 is a person for whose ICI sector employees an affiliated bargaining agent has obtained bargaining rights (and those bargaining rights have not been abandoned or terminated), then that respondent is bound by the terms of any collective agreement which the relevant employer bargaining agency had statutory authority to enter into. If the respondent is such a person and the collective agreement terms in question are terms to which

the employer bargaining agency had statutory authority to agree then that, in our view, is the end of any statutory question. Any remaining issues would be issues of interpretation, application, administration or alleged violation of the agreement.

28. As we read the decision in *Kapuskasing #2*, it did not suggest that there was some statutory limitation on the applicability of a construction industry collective agreement to circumstances in which the "employer" party is functioning only as "owner" or in some other supposedly limited capacity. On the contrary, the Board noted that "it may well be that an owner can be obligated by the provisions of a collective agreement to let out contracts only to general contractors in contractual relations with a particular trade union." It went on to consider whether the terms of the agreement in question could be interpreted as having that effect. It concluded that they could not. The panel which decided *Brant #1* took it that the dispositive finding in *Kapuskasing #2* was that the respondent was not an employer in the construction industry. With great respect to that panel, it appears to us that the dispositive finding in *Kapuskasing #2* was that the subcontracting clause on which the trade union relied did not prevent an "employer" from letting "a primary contract".

29. We respectfully disagree with and reject the notion that, apart from any question of interpretation of the language of the collective agreement, the Board is bound to consider whether the respondent to a referral to arbitration under section 124 was acting as a person operating a business in the construction industry in respect of the subject matter of the grievance. If we are wrong in this, and the language of the legislation does require the Board to determine, on each referral to arbitration under section 124, whether the "employer" party was a "person who operates a business in the construction industry" in relation to the subject matter of the grievance at the time it occurred, then we are persuaded that the respondent satisfies that test in this case.

30. The respondent concedes, as it must, that it is not necessary for a person to have direct employees performing construction work on a particular project in order to be a "person who operates a business in the construction industry" in relation to that project. Indeed, if being an operator of a business in the construction industry is a statutory prerequisite to being an "employer" who can be bound by a construction industry collective agreement then, in view of section 121 and the analysis we have already set out, it must be possible to be a "person who operates a business in the construction industry" without directly employing any construction workers. Having eliminated that as a means of distinguishing those who satisfy the "person who operates a business in the construction industry" test from those who do not, it does not seem to us that ownership of the property on which the construction takes place is a relevant distinguishing characteristic by itself. Businesses in the construction industry take many forms. Some construction industry businesses purchase land for development - that is, with the intent of reselling the land after causing buildings to be constructed on it. Even if none of the actual construction is performed by direct employees of such a developer, no one would seriously suggest that the developer was not operating a business in the construction industry.

31. If it is at all relevant to ask whether a person bound by a construction industry collective agreement is a "person who operates a business in the construction industry", we do not accept that the question is to be answered in the negative if the person in question is a "mere purchaser" of construction services. In a broad sense, and except for individuals engaged only in the sale of their own labour, all those who operate businesses in the construction industry purchase construction services either from their employees or from independent contractors or both. Some do so in order to discharge obligations they have undertaken in a contract to supply construction services. Others do not. When interpreting the phrase "person who operates a business in the construction industry" in relation to certification applications, the Board has made no distinction between ven-

dors of construction services and those who “operate a business in the construction industry” only with a view to enjoying the results themselves. We see no reason why such a distinction should be imported into the same phrase if the interpretation and application of that phrase is of some relevance to the disposition of a grievance arising under a collective agreement.

32. As we have already observed, if being an operator of a business in the construction industry is a statutory prerequisite to being an “employer” who can be bound by a construction industry collective agreement, then it must be possible to be a “person who operates a business in the construction industry” in the sense intended by clause 117(c) without directly employing any construction workers. The only way one can in any sense “operate a business in the construction industry” without directly employing construction workers is by engaging an independent contractor or contractors to bring construction about. It necessarily follows that the mere purchasing of construction services from independent contractors must amount to operating a business in the construction industry in the sense intended by clause 117(c) in at least some circumstances. Having regard to the purpose of the statutory provisions in question, we cannot see why the Legislature would have intended the phrase “operates a business in the construction industry” to apply to mere purchasers of construction services from independent contractors in some circumstances and not in others. It seems to us that if the phrase was intended to have continuing significance once a collective bargaining relationship is established, it must have been intended to describe anyone who effects construction, whether by hiring construction workers or by engaging contractors.

33. Here, Metro effected construction. It had it in its power to determine how and by whom that construction would take place. It chose to have consulting engineers act as its agent in respect of the details. If its status in respect of the project is of any relevance to the applicability to it of the collective agreement then, for the reasons we have set out, that status should not depend on whether that agent was an employee or an independent contractor. Implicit in Metro’s argument is that the consulting engineers exercised the sort of control which would satisfy the control test for which it contends. They did so as agent for Metro. As against the contractor, Metro had the right to bypass the consulting engineers and exercise that control directly. Therefore, Metro did have the sort of control which even it concedes would make it a “person operating a business in the construction industry” in relation to the subject project.

34. In summary, once it is established that the respondent is bound by the subject provincial agreement by reason of its being a person for whose employees affiliated bargaining agents have bargaining rights then, in our view, the only relevant question about its activities in relation to the subject project is whether those activities violated some provision of that provincial collective agreement. We respectfully reject the conclusion of the panel in *Brant #1* that there is a threshold question whether Metro is also a “person who operates a business in the construction industry”, either generally or in relation to the project which is the subject of the grievance. If that is a threshold question, however, we reject the control test postulated in *Brant #1* as the method of answering it. The fact that Metro was responsible for bringing about the construction and had it in its power to chose how and by whom the construction would be performed is enough to make it a “person who operates a business in the construction industry” for any relevant statutory purpose.

35. We turn, then, to the question whether the activities complained of in this grievance violated the provincial agreement.

36. The clause which the union alleges Metro breached reads:

505 SUBCONTRACTING

The company shall not directly or indirectly sublet any work under the jurisdiction of this

Agreement to any other Employer or Employee who is not a party to an IBEW Construction Agreement nor require any employee to work on a piecework basis.

There is no challenge here to the well-established proposition that a collective agreement term which restricts or controls the subcontracting or contracting out of work which might be performed by bargaining unit employees is a legitimate form of union security provision: *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022 (jud. rev. denied (1979) 24 O.R. (2d) 399 (Ont. Div. Ct.)). There is no suggestion that this is something which is beyond the scope of the province-wide bargaining in which employer and employee bargaining agencies are by the Act authorized to engage. It seems common ground that the electrical work included in Metro's contract with Toronto was the sort of work contemplated by the phrase "work under the jurisdiction of this agreement". Toronto is not party to "an IBEW Construction Agreement". If Metro "directly or indirectly sublet work" to Toronto, then it violated the provincial agreement.

37. As "sublet" and "subcontract" are synonymous in this context, the remaining issue in this case is the very issue addressed in *Kapuskasing #2* in 1981, three years before the collective agreement in question here was negotiated. That decision held that "[s]ubcontracting involves the awarding of a secondary contract, whereby a subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor" and that someone who lets a contract for the performance of work which they are not themselves under a contractual obligation to perform for someone else cannot be said to have "subcontracted" any work. Like the respondent in *Kapuskasing #2*, Metro was under no contractual obligation to any other person to perform the work for which it let a contract to a "non-union" contractor. In the absence of any evidence that the parties to the collective agreement before us agreed at the time on some other meaning for "subcontract" or "sublet", we see no reason not to follow *Kapuskasing #2*, on this issue and find that in contracting with Toronto Metro did not "sublet" work.

38. As the respondent points out, the decision in *Kapuskasing #2* gives the word "sublet" its ordinary meaning. The Shorter Oxford dictionary defines "sublet" as meaning, among other things, "to lease out (work, etc.) under a subcontract". It says the verb "subcontract" means "to make a subcontract" and that the noun "subcontract" means "a contract, or one of several contracts, for carrying out a previous contract or part of it" (emphasis added). The terms "subcontractor" and "subcontracting clause" are defined in *Labour Law Terms: A Dictionary of Canadian Labour Law*, Sack, Jeffrey and Poskanzer, Ethan (Toronto: Lancaster House, 1984) as follows:

subcontractor independent contractor who is engaged by an employer to perform part of the work which the latter has contracted to do; a **subcontracting clause** is a provision in a collective agreement restricting the right of an employer to subcontract bargaining unit work

[emphasis added]

39. The union argued that *Kapuskasing #2* was wrongly decided, and invited us to interpret the word "sublet" the way "subcontract" was interpreted in the following passages from *Brant #1*:

15. Like most collective agreements, one of its obvious purposes is to define and protect union members by assuring them access to the work encompassed by the collective agreement. a subcontracting clause is then included in the collective agreement as an expansion of this job protection as it gives conditional rights to an employer to hire outside of the security clause. But, when an employer wants to hire outside of workers covered by the security clause, it is obligated to do so in accordance with article 1(c); that is, that it can only subcontract to a subcontractor who is also bound by the Provincial Agreement. Subcontracting must then be recognized as the awarding of a contract to perform work encompassed by the collective agreement by anyone not covered by the union security clause.

17. ... Thus, subcontracting is understood simply to be the hiring of anyone other than those covered by the collective agreement's security clause.

40. The passages from *Brant #1* on which the union relied cannot be considered in isolation from the fact that the panel in that case heard *viva voce* evidence that the parties who bargained the collective agreement there in issue had formed a special understanding about the meaning of "subcontract". That the passages relied upon by the union must be understood in that context is made clear by the decision itself, in the portion of paragraph 17 to which the union did not refer in its written argument:

17. Subcontracting as we have defined it above is in accordance with the evidence given as to the parties' understanding of the meaning of article 1(c). The parties who drafted and negotiated this collective agreement understand article 1(c) to bind any employer who is subject to the collective agreement to abide by it whenever it contracts to have skilled work done by anyone other than those covered by article 5. We recognize that this interpretation was not understood or intended by the respondent to these proceedings. But be that as it may, the respondent is bound by the contract drafted by its agent on its behalf and must also be bound by the interpretation that that agent shared with the other party to the collective agreement.

41. Neither the applicant nor the intervener led any evidence that in bargaining for the subject or any previous collective agreement they had agreed upon or even discussed the meaning of "sublet" in its application to employers who are not "contractors" who contract to perform electrical work for others. Indeed, the language of the agreement itself suggests that the parties did not specifically consider whether the provisions of the subject agreement were appropriately worded so as to bear application to employers other than contractors. After providing in its preamble that "[i]n this Agreement, the terms Contractor, Employer and Company are interchangeable", Section 201 of the agreement says this:

201 CONTRACTOR QUALIFICATIONS

Certain qualifications, knowledge, experience and financial responsibility are required of everyone desiring to be a Contractor in the Electrical Industry. Therefore, an Employer who contracts for electrical work is a person, firm or corporation having these qualifications and whose principal business is Electrical Contracting and who maintains a permanent place of business and an adequate financial status to meet payroll requirements.

In defence of the appearance of a clause like this in a provincial agreement purportedly binding on contractor and non-contractor employers alike, counsel for the union suggested we might conclude that this was language imported unchanged from agreements which the union and employer association parties had made before the advent of statutory province-wide bargaining, agreements which would only have covered contractors. He was unable to say why, if we could suppose this about Section 201, we could not suppose the same about section 505. Counsel for the union asked rhetorically why the bargaining parties would have used language inapplicable to non-contractors. The language of the agreement suggests that they simply did not think about non-contractors.

42. The intervener agrees with the union that section 505 applies to any contracting out of work, not just to "subcontracts". Counsel for the intervener argues that

Given the agreement between the Applicant and the E.T.B.A. on the intent, purpose and meaning of Article 5.05 [sic] it is respectfully submitted that it cannot be challenged in the absence of an application under section 89 of the Act alleging a violation of section 152(2) [sic] of the Act or in the absence of evidence to suggest that the language was intended to mean otherwise or that it has been consistently applied in a manner that derogates from the position taken by the Applicant and Respondent [sic].

We do not accept that the terms of a provincial agreement must be taken to mean whatever the

statutory bargaining agents for the employers and unions bound thereby may subsequently agree for the purpose or in the context of a particular dispute about the application of the agreement. The only effective agreement is the one those bargaining agents make at the time the collective agreement is settled. That agreement is supposed to be in writing, a requirement which is of particular importance when the employers to be bound are not at the bargaining table. There is no evidence that the agreement to which counsel refers was made at the time the collective agreement was settled. If the employer and employee bargaining agencies have the power to negotiate an amendment to the 1984 collective agreement with retroactive effect, which we need not decide, there is no suggestion they have done so. If there were, such action by the employer bargaining agency would no doubt be closely scrutinized under subsection 151(2).

43. We are persuaded that the word "sublet" in section 505 of the subject agreement means the same as "subcontract" did in the clause under consideration in *Kapuskasing #2*. The addition of the words "directly or indirectly" may ensure that any transaction which is in substance a "sublet" will be caught whatever its form, but does not broaden the language to cover any contract which is not in substance a "subcontract". Metro's contract with Toronto was not in substance a "subcontract".

44. Accordingly, we find that the respondent was bound by the provincial agreement and section 505 thereof in respect of the project in question, but did not violate section 505 by contracting with Toronto for performance by the latter of electrical work on that project.

CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE; March 3, 1989

1. The respondent raised two defences to the grievance:

- a) That it is not an employer in the construction industry with respect to this grievance, but rather an "Owner" who let a capital works project to a contractor and accordingly was not bound to the Provincial Collective Agreement; and
- b) In any event, as a matter of contractual interpretation, there was no violation of the obligation contained in section 5.05 of the Collective Agreement.

2. Although I have some reservation to the finding of the Board in (b) mentioned above, I am completely satisfied with the finding that the respondent is bound to the collective agreement. This decision by the Board means that once a person is found to be an employer in the construction industry and is bound to the collective agreement, it makes no difference whatsoever whether the employer is a sub-contractor, general contractor, owner/builder or owner. This finding of the Board also makes it clear that once a union gains bargaining rights in the construction industry those bargaining rights are protected and remain in full force unless the employees of the employer succeed in terminating those rights or the union abandons its bargaining rights in accordance with the Act.

3. The Board in this decision has clarified the *Brant County case #1*, which left a wrong impression that in certain circumstances an employer in the construction industry could become an owner and not be bound to a collective agreement. In *Kapuskasing #2* the impression was left that the employer, whether a contractor or owner could be bound to the collective agreement providing the language of the collective agreement effected that. This decision of the Board confirms *Kapuskasing #2*. Therefore, the controversy left by the above-mentioned cases has now been corrected and clarified.

4. In regard to the Board's decision that although the respondent is bound to the provincial agreement and section 5.05 thereof but not in violation of the same, this finding is strictly on the language contained in sections 2.01 and 5.05. With regard to the matter whether a party is prohibited from contracting out work to a contractor not in contractual relations with the union, that is a matter for further collective bargaining between the relevant parties.

2419-88-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Tridon Limited, Respondent v. Tridon Employees' Union, Intervener

Certification - Interference in Trade Unions - Intimidation and Coercion - Pre-Hearing Vote - Applicant union claiming that pamphlets and cartoons distributed to employees by the incumbent union at the "11th" hour were so misleading as to warrant a second vote - Board reluctant to interfere in union election campaigns - Applicant union called no evidence indicating that the statements were false - Reasonable employees would see the material as propaganda in any event - No reason to believe the material would impair the employees' freedom to vote as they considered appropriate - Vote ordered counted

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *John Moszynski* and *Clare Meneghini* for the applicant; *Colin Morley* and *Dave Albinson* for the respondent; *Michael Horan* and *Vi Harras-Persinal* for the intervener.

DECISION OF THE BOARD; March 9, 1989

1. By decision dated February 3, 1989, a partially differently constituted panel of the Board ("the first panel") directed the taking of a pre-hearing representation vote in this application for certification. Because of an allegation raised by the intervener, the Tridon Employees' Union ("the TEU"), with respect to the Form 9 filed by the applicant, the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("the CAW"), the first panel also directed that the ballot box be sealed. The vote was scheduled for February 14, 1989.

2. In a letter dated February 13, 1989, the TEU withdrew its allegation about the Form 9. The first panel subsequently endorsed the file directing that the vote be counted.

3. On the day of the vote, the CAW indicated that it intended to file allegations about material which had been distributed by the TEU during the campaign. The Returning Officer therefore sealed the ballot box and directed that the CAW file its allegations within forty-eight hours. The CAW filed allegations on February 16, 1989. The representations relating to the campaign were scheduled before this panel of the Board. The CAW also filed a subsequent letter on February 22, 1989, which was the subject of dispute before this panel of the Board.

4. By letter dated February 17, 1989, counsel for the TEU requested that the vote be counted immediately. That request was not renewed before this panel and the ballot box has remained sealed.

5. Counsel for the TEU also advised the Board by letter dated February 21, 1989, that the TEU would be raising its Form 9 allegation before the panel hearing the representations of the CAW. Counsel did in fact raise that matter before us. He also objected to the panel's entertaining the CAW's February 22nd letter on the basis that it was untimely, after being sent after the forty-eight hour deadline imposed by the Officer.

6. During consideration of the timeliness issue, counsel for the CAW stated that the CAW was not raising any new allegations in its February 22nd letter. In particular, it was raising no allegation about employer involvement. The concern of counsel for Tridon and of counsel for the TEU that allegations additional to those raised in the February 16th letter had been prompted by the following paragraphs in the February 22nd letter:

6. Leaflet captioned, "Vital Information Given to T.E.U.", signed "Your Union" and undated.

This leaflet was posted on the Tridon Employees Union's bulletin board at the Burlington plant on February 13, 1980. Copies of the leaflet were found on the lunchroom tables on the same date. Finally, copies of the leaflet were handed out to employees leaving and entering the plant on February 13, 1989. The same leaflet was found on the lunchroom tables at the Oakville plant and was distributed to employees at or about 3:00 p.m. on the afternoon of February 13, 1989 by a representative of the Tridon Employees Union, Grace Proulx.

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9. Leaflet captioned, "To All Tridon employees Union Members", with the subheading, "February 14, 1989 - Again It Will Be A Sad Day for CAW".

This leaflet was signed by the Tridon Employees Union and undated. The leaflet was distributed in the same manner and at the same time as the literature referred to in paragraph 6 above.

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11. Cartoon captioned, "Training Manual for Union Rating ... we need the per capita ... bad - CAW For Disaster". ("the cartoon")

This material was distributed without signature and was not dated. The cartoon material was found on the Tridon Employees Union's bulletin boards at both the Oakville and Burlington locations. The material was also found on the lunchroom tables in the cafeterias at both the Oakville and Burlington locations in the afternoon of February 13, 1980. Copies of the cartoon leaflet were also found in the washrooms at the Burlington plant.

7. Counsel for the TEU acknowledged that the three documents referred to above were distributed to the employees more or less at the times and in the places alleged, that is, that the materials were distributed to employees, at the "11th hour" in the workplace.

8. Having heard the submissions of the TEU and the CAW on these two preliminary matters (the respondent, Tridon Limited ("Tridon") made no submissions on the matter of the Form 9), we recessed and reconvened to deliver the following oral rulings:

The Form 9 allegations were withdrawn by the intervener, for reasons which are of no concern to the Board. On the basis of the material in front of it, the panel directing the vote was satisfied there it had no reason to seal the ballot box after the intervener's allegations were withdrawn. The reason the box was subsequently sealed had nothing to do with the Form 9, but with the allegations raised by the applicant. We are not prepared to entertain the Form 9 allegations raised and withdrawn by the intervener.

The February 22, 1989 letter from the applicant raises no new allegations but merely particularizes further the allegations in the February 16, 1989 letter which was filed within the time directed by the Officer. The intention of the applicant to particularize further the allegations already made by the applicant on February 16th is clear from the first line of the February 22nd letter. Both letters were filed by the date fixed by Form 72, that is, February 22, 1989.

9. The first line of the February 22nd letter from counsel for the CAW (not counsel appearing at the hearing) states: "As indicated in my letter of February 16, 1989, I am forwarding more detailed particulars of the representations outlined in our request to the Board dated February 16, 1989". That statement actually refers to two February 16th letters, one in which counsel set out in basic form the allegations that were made and a second one in which counsel indicated she could not make more detailed representations by the time set by the Officer but that these would be forthcoming by the date fixed in Form 72. To the extent that we have found the February 22nd letter to be particulars of the February 16th letter, we do not have to deal with any conflict arising from the direction of the Officer to file representations within forty-eight hours and the date fixed by Form 72. We can see, however, one possible way in which such conflict could be resolved. The CAW sought to have the ballot box sealed; had it filed no allegations within forty-eight hours, presumably the box would have been opened and the vote counted.

10. We note with respect to the Form 9 that the panel directing the vote, initially directing that the ballot box be sealed and subsequently directing that the box be opened, had before it the allegation with respect to the Form 9 which was withdrawn. Counsel for the TEU accepted that that panel had made a *prima facie* decision about the adequacy of the Form 9 when it ordered the box opened but wished to raise the TEU's specific allegation again.

11. None of the parties called any oral evidence with respect to the CAW's allegations. The parties agreed to the CAW's providing us with an exhibit book containing material which had been distributed over a period from October or November 1988 to February 1989, from which one document objected to by Tridon and two by the TEU had been removed.

12. The CAW's case falls into two branches: the first is that the material is misleading because it is false and could not be responded to by the CAW because it was distributed at the 11th hour; the second is that certain of the material is so offensive that it demands a message from the Board in the form of a second representation vote.

13. We are not persuaded by either of these arguments to set aside the vote that has been held and to direct a second vote.

14. The practice of the Board with respect to its reluctance to interfere in union election campaigns is well-known. The Board in *McMaster University*, [1979] OLRB Rep. July 685, phrased the test at paragraph 11 as follows:

11. ... Despite its general position [that it should not monitor campaigns preceding a representation vote], the Board does not close its eyes entirely to the conduct of the campaign if, in its judgment the campaign has been so waged by one party to preclude the other party from a meaningful opportunity of reply and thus to impair the employees' freedom of choice and thereby call into question the weight to be accorded to the results. It is not every unanswerable claim which will cause the Board to intervene. However, in those instances in which a claim is made, which is *in fact false* and which relates to a significant factor which would be involved in the voter's final evaluation of the issue on which he is voting, and which the other party has not

yet had adequate opportunity to dispute, the Board will act by ordering a new representation vote. See *Joseph Gould and Sons Limited* 52 CLLC ¶17,039. [emphasis added]

In *Joseph Gould, supra*, the incumbent had mailed a letter to the employees in which it cautioned the employees, among other related comments, not to “hand over our Union to a group of anti-Unionists, anti-Jews, Jew-haters, anti-semites and such like”. The Board ordered a new representation vote because “the conduct complained of [including the timing of the mailing ‘at the last possible moment’ as well as the content of the letter] is almost certain to have impaired the employees’ freedom of choice”.

15. Greater appreciation of the notion of impairment of the employees’ freedom of choice can be found in cases such as *Stauffer-Dobbie Manufacturing Co. Ltd.* 59 CLLC ¶18,147 and *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19. The first speaks of employees “evaluating [the material] at its true worth”; the second of material that “[overpowers] the critical faculties of employee voters”. In *Cara Operations Limited*, [1985] OLRB Rep. Feb. 222, a termination case, the Board said it had to decide whether “the letter in [that] case has deprived the employees of the ability to exercise their ‘critical faculties’ in assessing whether the respondent should continue to represent them in collective bargaining”.

16. The CAW says that the material distributed to employees (that is, both leaflets and the cartoon) contains false statements and that the onus is on the TEU to show the statements are true. We disagree. The CAW alleges that the material is such that it warrants a second vote and that one reason for this is that the statements are false. The onus is on the CAW. The CAW, however, called no evidence. We are not in a position to find the material true or false and the CAW fails on this point alone. Further, however, we cannot infer that a reasonable employee would see this material as anything but part of the war of paper which went on between the TEU and the CAW for a period of about three months. In particular, the material suggests the CAW wants to represent Tridon employees only to get their dues and that the CAW can do nothing more than the existing representative, the TEU. These are common themes in organizing campaigns and they were common throughout this campaign - they appeared in the first circular from the TEU in the exhibit book.

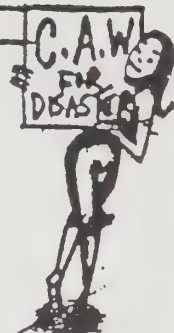
17. The cartoon is impugned not only for false allegations but also for the stereotyped caricatures it displays. Again, we believe reasonable employees would see the cartoon as another piece of propaganda, albeit somewhat more graphic. We are not prepared to infer, as requested by counsel for the CAW, that the cartoon would appeal to the prejudices of employees, diverting their concerns from the main issues and prompting them to vote against the CAW. The CAW fails on this point as well.

18. We have attached a copy of the cartoon. Counsel for the CAW stressed that figures A and G are an appeal to prejudices, that they communicate to employees that a vote for the CAW would be a vote for Jews and blacks. We see the cartoons in another light. To us, they appear to be a rather crude effort to convey certain characteristics through the use of stereotypes. Our refusal to accept the CAW’s invitation to show our lack of regard for such material by directing a second vote should not be taken to mean we condone the material. On the contrary, as the Board said in *Joseph Gould, supra*, the use of discriminatory material, based on stereotyped and prejudicial attitudes, “represents the use of a tool which thinking people in a free society must abhor and repudiate”. Unlike the Board in that case, however, we have no reason to believe the material before us would be successful in impairing the employees’ freedom to vote as they considered appropriate.

19. There being no merit in the CAW’s allegations, we direct that the ballot box be opened and the vote counted.

20. There was one other issue before us: the determination of the appropriate bargaining unit. The TEU and the CAW agree that the unit should be as described in the collective agreement between Tridon and the TEU; Tridon proposes a different unit. (See the Board's February 3, 1989 decision.) Counsel for Tridon advised the Board that he could not add anything further on the issue than the submissions contained in his letter to the Board dated January 27, 1989. Neither the CAW nor the TEU made submissions on that issue. We do not need to determine the appropriate bargaining unit unless the CAW is successful in the vote. That matter will therefore be dealt with after the vote has been counted, should it be necessary to do so, on the basis of written material now before us.

TRAINING MANUAL FOR UNION RAIDING... WE NEED THE PER CAPITA...BAD.



① PLANT AN INSIDER IN THE RANKS.



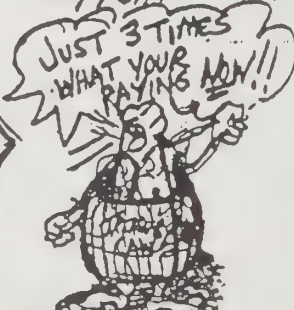
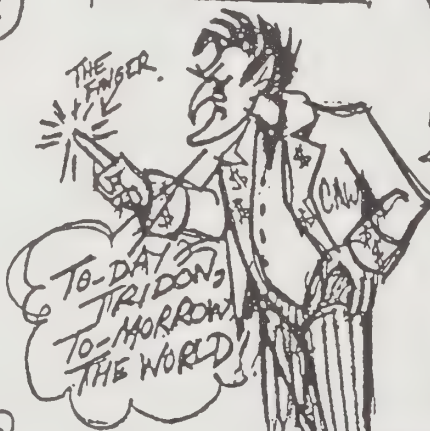
② SCARE MEMBERS WITH FALSE RUMORS.



③ SPLIT RANKS GET THEM FIGHTING.



④ THREATEN THEM!!



⑤ EASY PAYMENT DUES.

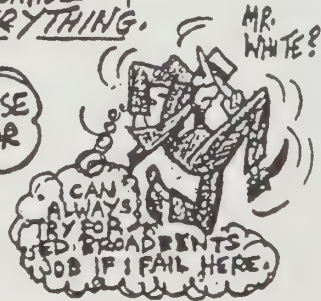


⑥ SAYE THEM FROM POVERTY.

⑦ PROMISE EVERYTHING.



⑧ IMPLORE THEM!!



3052-88-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. U-Need-A Cab Limited, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Request by applicant for a pre-hearing representation vote - Board aware of a prior outstanding certification application by the applicant with respect to some or all of the same employees of the respondent - A request to withdraw the previous application had not yet been dealt with because of the issue of the imposition of a bar - Whether Board should appoint an officer to make voting arrangements - Decision to delay processing the application would be inconsistency with the Board's approach to pre-hearing vote applications - Officer appointed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON:
March 16, 1989

1. This application for certification was filed on March 9, 1989. In it, the applicant requests that a pre-hearing representation vote be taken. If none of the employees in the bargaining unit applied for was affected by a previously filed and still outstanding application, the initial processing of this application to the point at which notice of it would be given to the respondent employer would include the appointment, by a panel of the Board, of a Labour Relations Officer. Pursuant to that appointment, the Labour Relations Officer would examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the *Labour Relations Act* ("the Act"), and confer with the parties and report to the Board on their positions with respect to the description and composition of an appropriate bargaining unit and of the voting constituency for the purpose of any vote, as well as other matters relating to the possible conduct of such a vote. Notice of the appointment of the Labour Relations Officer and of the place and time of his/her meeting with the parties (usually two days after the terminal date fixed by the Registrar under section 2 of the Board's Rules of Practice) would then be sent out to the applicant and respondent along with the other material which issues from the Board promptly after an application for certification is received.

2. On March 13, 1989, this panel was called upon to consider the otherwise routine appointment of a Labour Relations Officer in this application. As it happens, we are aware that there is a prior and still outstanding certification application by the applicant with respect to some or all of the same employees of the respondent. We understand that the applicant applied for leave to withdraw that application before filing this one and that the request to withdraw has not yet been dealt with because the Board is awaiting the respondent's written representations with respect to whether the dismissal of the first application (which would ordinarily be the minimum response to the request for withdrawal, having regard to the stage at which it was made) should be accompanied by the imposition of a bar on further applications pursuant to clause 103(2)(i) of the Act. The appropriate disposition of the first application is a matter which will be dealt with by another panel. The only question which arises now is whether, in these circumstances, we can or should now make the otherwise routine appointment of a Labour Relations Officer to meet with the parties to this application for the usual purposes.

3. Subsection 103(3) of the Act provides that:

(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the

application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

It was at one time thought that this subsection precluded the Board taking any step in the pre-hearing processing of a "subsequent application" (other than to acknowledge receipt of it) unless and until the Board had either decided to proceed in the manner contemplated by sub-paragraph (a) or had issued a final decision with respect to the prior application. The correctness of that view turns on the meaning of "consideration of the subsequent application". In our view, the word "consider" means "decide" or "determine on the merits", rather than "process": see *Board of Education for the City of Hamilton*, [1987] OLRB Rep. June 847 at paragraph 15; and *Kirouac Contracting Ltd.*, [1987] OLRB Rep. Oct. 1262 at paragraph 13; and see *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1071, where the Board similarly interpreted similar language in subsection 40a(22) of the Act. Subsection 103(3) speaks to whether and when the Board will determine the merits of a "subsequent application". It does not prevent the administrative processing of an application to the point at which it is ready for hearing on the merits. Indeed, the appropriate application of subsection 103(3) to any particular situation may itself be a matter of dispute which should not be resolved except following a hearing.

4. We do not agree with our colleague that the question whether to make the usual appointment of a Labour Relations Officer in this application ought to be put before the panel which will determine, at some later date, whether or not to impose a bar upon the dismissal of the first application. The implicit premise of that suggestion is that that panel would not decide the question now before us until it had decided whether or not to impose a bar in dismissing the first application. We recognize that our appointment of a Labour Relations Officer and any actions he or she might take would be of no consequence if that other panel decided to impose a bar, and that the delay involved in awaiting that decision may not be great. Nevertheless, there is an important point of principle here. In our view, and with great respect to our colleague, a decision to delay processing of this application because of the possibility that it will fail on an issue raised by the respondent employer is inconsistent with the Board's approach to applications in which a pre-hearing representation vote is requested.

5. Membership evidence is the primary basis on which certification applications are determined in "ordinary" applications under section 7 of the *Labour Relations Act*. Whether this should be so is a matter of perennial debate. Employers and those who represent their interests argue that membership evidence is an unreliable basis for the certification decision, which they say should be based on a representation vote in every case. Employers are often incredulous that a majority of their employees wish to be represented by a trade union. It is argued on their behalf that collective bargaining will be more fruitful if that incredulity is first overcome by credible demonstration of employee support by means of a representation vote. Trade unions oppose the use of representation votes in every case, for reasons which were reviewed by Professor Paul Weiler in *Reconcilable Differences* (1980, the Carswell Company Limited, Toronto) at pages 37 to 49. One of the concerns of trade unions is the adverse effect of delaying the consultation of employee wishes until after any

other matters put in dispute by the employer have been fully adjudicated. The response to this debate in some jurisdictions has been to require representation votes in every case but conduct them quickly before hearing the application on the merits. While not compulsory in this jurisdiction, section 9 of the Act provides that an applicant trade union may opt for a quick vote when it files its application. We do not propose here to enter the debate about the relative merits of membership evidence and representation votes as the basis for determinations of employee wishes. We simply note that if certifications based on representation votes are more palatable to employers and do provide a better foundation for collective bargaining than those based on membership evidence, then it is obviously in the interests of harmonious labour relations that the quick vote option be made as attractive as possible to trade unions. That involves ensuring that the processing of the application through to and including the conduct of the vote will not be susceptible to delay merely because a respondent employer raises an argument which, if successful, would result in the dismissal of the application.

6. Certification applications are regularly processed through to and including the conduct of a pre-hearing representation vote notwithstanding the existence of issues which, if resolved in favour of the opponents of the applications, would result in their dismissal. From time to time a respondent employer argues that the prospect of its success on such an issue ought to lead the Board to determine that issue before conducting any pre-hearing representation vote. The Board has repeatedly rejected such arguments. As the Board observed in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293 at paragraph 8:

... A “pre-hearing representation vote” is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result.

In *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589 the Board observed that:

4. The Board’s response under subsection 9(2) to a request that a pre-hearing vote be conducted involves a decision about procedure, not substance. The procedural question is whether to gather up additional information about the wishes of employees to be represented by the applicant. The employees whose wishes would be tested in this way collectively constitute one or more voting constituencies, which may very well not be coextensive with the bargaining unit or units ultimately found appropriate by the board. The voting procedure can be designed to ensure that a vote of employees in that bargaining unit or units can, in effect, be retrospectively reconstructed from ballots cast by persons in the voting constituency or constituencies. The Board’s discretion in defining a voting constituency is fettered only by its own assessment of the possible utility of a pre-hearing vote conducted in that constituency. If it appears to the Board that not less than 35 per cent of the employees in a voting constituency were members of the applicant at the time the application was made, the Board may conduct such a vote *before* entertaining the representations and evidence of the parties and other interested persons with respect to matters relevant to the disposition of the application and *before* determining whether and to what extent the results of that vote could or should be relied upon in dealing with the application.

5. Except in very simple cases, there will always be some risk that no use can ultimately be made of the results of a particular pre-hearing representation vote. Against that risk must be balanced the potential benefit of the quick vote, both in the case at hand and for the certification process generally. In the Board’s view, the purpose described in the preamble to the Act is best served by making the section 9 quick vote procedure a real and workable option in the widest possible range of cases. As a matter of policy, the Board will not be quick to conclude that a pre-hearing vote should not be conducted because of a risk, however real, that no use could ultimately be

made of the results. Generally, the Board would rather conduct a pre-hearing vote which might later prove useless than fail to conduct a pre-hearing vote which might have been useful.

Although we are not yet at the stage at which the determinations contemplated by subsection 9(2) are to be made, these observations bear at least equal application to the purely procedural decision to appoint an officer to find out what the issues are in this application so far as the applicant and respondent are concerned.

7. It would entirely inconsistent with the Board's approach to applications under section 9 for the Board to delay making the usual officer appointment because in some subsequent adjudication (albeit one which will take place relatively soon) this application may be brought to an end by the imposition of a bar in a prior application. Accordingly, we hereby appoint a Labour Relations Officer to be designated by the Registrar:

- (1) to confer with the parties as to the description and composition of an appropriate bargaining unit;
- (2) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the Labour Relations Act;
- (3) to confer with the parties as to the description and composition of the voting constituency, the list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number of locations of the polling places;
- (4) upon consent of the parties to investigate any other matter relating to the application; and
- (5) to report to the Board.

DECISION OF BOARD MEMBER JAMES A. RONSON; March 16, 1989

1. By this application the Applicant Union requests that a representation vote be taken among the employees of the Respondent Employer in the voting constituency as determined by the Board (section 9(1) and 9(2) of the Act). Upon receipt of such an application the Board *may* determine a voting constituency and *may* direct that a representation vote be taken among the employees in the voting constituency.

2. I believe the following factors affect our *first* exercise of discretion in this matter:

(A) On November 30, 1989 the Union filed an application for certification, (the "First Application"), concerning the same voting constituency we are dealing with in this application. The First Application is still before the Board. The Union's proposed bargaining unit is:

"All licensed taxi drivers of the respondent working under the U-Need-A Cab roof sign in the City of London, save and except, road chief supervisors, persons above the rank of road chief supervisor, dispatch staff, office and clerical staff, license plate owners and car owners.

CLARITY NOTE: This application is being made to represent only those persons who drive a vehicle and who own neither a car nor a license plate nor any combination of same."

The Employer's proposed unit is:

"All employees of the Respondent in the City of London, save and except road chief supervisors, persons above the rank of road chief supervisor, dispatch staff, maintenance staff, office and clerical staff."

On a sheet attached to its Reply the Employer lists various groups of employees who, it alleges, are dependant contractors under the Act.

- (B) On January 13, 1989 a panel of the Board composed of R. MacDowell, Alternate Chair, K.S. Davies and M. Rozenberg endorsed the Board record in the First Application as follows:

"A Board Officer is hereby appointed to meet with the parties and endeavour to settle the matters in dispute between them, and, if necessary, to enquire into the employee list and composition of the bargaining unit."

- (C) A review of the file in the First Application discloses that the Union and Employer had serious differences arising out of the employee lists which had been provided to the Union.

- (D) By written request dated March 8, 1989 the Applicant Union asked leave of the Board to withdraw the First Application.

- (E) By registered mail on March 9, 1989, the Union filed its second application for certification and requested a pre-hearing vote. The proposed bargaining unit is:

"All licensed taxi drivers of the respondent working under the U-Need-A Cab roof sign in the City of London, save and except, road chief supervisors, persons above the rank of road chief supervisor, dispatch staff, office and clerical staff, license plate owners and car owners.

CLARITY NOTE: This application is being made to represent only those persons who drive a vehicle and who own neither a car nor a license plate nor any combination of same."

- (F) I understand that in the First Application the Employer opposes the Union's request for leave to withdraw and wishes to submit argument to the Board that the First Application be dismissed and a bar be imposed on the Union preventing it from filing subsequent applications for certification within a given period of time.

3. Given this state of affairs, I would direct that this application be set down for hearing before the panel of the Board which deals with the Union's request to withdraw the First Application and immediately subsequent thereto. Not only are the bargaining unit problems and voting constituency problems intertwined between the two applications, but to proceed and determine the voting constituency in this application is to presume that the Union is entitled to withdraw the First Application without a bar being imposed.

4. I further direct that a copy of this, my decision, be delivered to the Employer by the Labour Relations Officer who attends upon the Employer at the direction of my colleagues, Mr. Gray and Mr. Patterson.

1101-87-R International Brotherhood of Painters and Allied Trades, Local 557, Applicant v. Wallcraft Painting and Decorating Ltd., Respondent

Certification - Construction Industry - Employer Support - Fraud -Reconsideration - Employee requesting Board reconsider its decision to certify the union - Allegations that union received employer support and certificate obtained by fraud - Cogent evidence pointing to possible violation of s.13 sufficient ground for reconsideration - Delay of 13 months in making reconsideration request is a factor in considering whether to vary or revoke the decision

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *M. Eayrs* and *H. Kobryn*.

APPEARANCES: *B. Fishbein* and *A. Colafranceschi* for the applicant; *George Vassos* and *Andy Cobean* for the respondent; *C. J. Abbass* and *Brad Cobean* for Brad Cobean.

DECISION OF THE BOARD; March 20, 1989

1. The applicant was certified by the Board, differently constituted, on August 6, 1987, as the exclusive bargaining agent of painters and painters' apprentices employed by the respondent in the construction industry in the industrial, commercial and institutional sector in the Province of Ontario and in all other sectors in the Board's geographic area #8. Brad Cobean, an employee of the respondent, has requested the Board to reconsider its decision to certify the applicant and revoke the certificates which were issued to the applicant. The request was made in a letter dated August 31, 1988 from Brad Cobean's solicitor. The letter contains allegations that the applicant and respondent together breached section 58 of the Act and that, by instructing its employees to join the applicant, the respondent has breached section 13 of the Act. A similar request was made by the respondent on July 20, 1988. It was dismissed by the Board in its decision which issued August 23, 1988.

2. The Board received written submissions on Brad Cobean's request from the solicitors for the applicant and for the respondent and, in a decision which issued November 14, 1988, the Board directed that the matter be listed for hearing for the purpose of receiving the evidence and representations of the parties on the issue of "...whether the Board should reconsider its decision to certify the applicant and, if so, whether the Board should vary or revoke the decision.".

3. The Board has the discretion pursuant to subsection 106(1) of the Act to reconsider its decisions. That subsection states:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The exercise of the Board's discretion involves two steps: first, should it reconsider, and second, if it does reconsider, should it vary or revoke the decision. An issue arose at the hearing as to whether the Board should receive the evidence and submissions of the parties on both steps or whether it should limit the evidence and representations to the first step. The Board received and considered the submissions of the parties and, for reasons given orally, ruled that it would proceed first to receive their evidence and representations relevant to and decide the question of whether the Board should reconsider its August 6, 1987 decision.

4. The Board has assessed the parties' evidence and reviewed and considered their submissions on it and on the relevant law. The Board's conclusions set out herein have been made having regard to the evidence and the submissions of the parties.

5. The Board's general practice with respect to requests for reconsideration of a decision is set out in its Practice Note No. 17. In order to bring some finality to its decisions, the Board's general practice is to not reconsider a decision unless the party making the request intends to adduce new evidence not previously available to it, and then only where that evidence, if proved, would be likely to make a substantial difference to the outcome, or to make representations which it had no previous opportunity to raise. *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, paragraph 4. The Board also has stated that those general standards should not be followed inflexibly. *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096, paragraph 5. In that case, the request for reconsideration did not satisfy the Board's general standard, but the Board decided to reconsider its decision because the request raised "...significant and important issues of Board policy...".

6. Applicant counsel argues that Brad Cobean's request for reconsideration does not satisfy the Board's general standards for granting such a request because all of the evidence on which he relies for support of the allegations that the applicant and respondent together have violated section 58 and the respondent has violated section 13 of the Act, was known to him at the time the application for certification was made. Applicant counsel contends that there are other reasons why the request should be denied, including in particular that the request does not represent a separate and distinct one from the earlier request made by the respondent and dismissed by the Board, and that there was inordinate and inexcusable delay in making it. Counsel for Brad Cobean and for the respondent did not claim that the general standards for reconsideration have been satisfied. Instead, they relied on the alleged misconduct of the applicant and respondent as sufficient grounds for the Board to grant the request. It is not surprising, then, that their arguments ran directly counter to those of applicant counsel.

7. Section 13 of the Act provides as follows:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code*, 1981 or the *Canadian Charter of Rights and Freedoms*.

In *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525, the Board was dealing with a request to reconsider a decision to certify a trade union. An employee had alleged that the employer had contravened section 13. The Board was confronted with the argument from the union and the employer that the employee making the request had known about the employer's support at the time of the application for certification. The Board responded to that argument at paragraph 22, as follows:

22. ...The Board's general practice is, in fact, not to reconsider a decision or to entertain new evidence unless a party proposes to adduce evidence which it could not previously have

obtained by the exercise of reasonable diligence. However, having regard to the strict prohibition contained in section 12 [now section 13] of the Act against certifying trade unions which have received employer support, and to the particular circumstances of this case - including the fact that Mr. Richardson was an employee acting at the relevant time at the behest of his employer - the Board is satisfied that it should exercise its discretion and reconsider its decision to certify [the union].

8. In the instant case, the Board has before it cogent evidence which points to a possible violation of section 13. Having regard to the strict prohibition in section 13, and faced with an employee's allegation that his employer has engaged in the prohibited activity, that is enough, in the Board's view, for it to reconsider its decision to certify the applicant. It is unnecessary at this stage of the proceedings for the Board to make a conclusive finding that the respondent has violated section 13. Therefore, the Board is satisfied that it should exercise its discretion in the circumstances of this case to reconsider its decision to certify the applicant and proceed to the next step in the process; that is, to hear the evidence and representations of the parties respecting whether the Board should vary or revoke its August 6, 1987 decision and decide that issue. In the result, it is unnecessary for the Board, at this stage of the proceedings, to deal with the other allegations made in support of the request. Their merits can be dealt with appropriately in the context of deciding whether the Board should vary or revoke its decision.

9. In coming to this conclusion, the Board has not overlooked applicant counsel's argument that the making of the request some 13 months after the Board's decision is inordinate and inexcusable delay, is in stark contrast to the delay of approximately two weeks in *Coons* and is reason enough to deny the request. In the circumstances of this case, where there is cogent evidence which points to a possible violation of section 13, together with the alleged violation of section 58, the issue of delay should not deter reconsideration of the Board's decision. That does not mean, however, that delay is not a proper factor for the Board to consider in deciding whether to vary or revoke its August 6, 1987 decision. The same may be said respecting applicant counsel's claim that this request is not separate and distinct from the earlier one made by the respondent.

10. This matter is to continue for hearing on March 29, 1989, and, if necessary, April 25th, dates previously set by the Board on agreement of the parties. The purpose of the hearing will be to receive the evidence and representations of the parties on whether the Board should vary or revoke its decision which issued August 6, 1987 certifying the applicant. Counsel for Brad Cobean is reminded of the request for particulars set out in letters from applicant counsel dated September 23rd, December 19th and December 20th, 1988.

2571-87-R Sheet Metal Workers' International Association, Local 537, Applicant v. Warren Steeplejacks Limited, Warren Mechanical Limited, Blastco Corporation, Respondents

Construction Industry - Related Employer - Main business of each of the respondents differed but companies used interchangeably - Construction industry activities of the companies had a common meeting ground in sheet metal work and sandblasting and painting - Board finding that respondents carried on associated or related activities or businesses - Board rejecting argument that s.1(4) requires the entities to exist in law contemporaneously - Respondents found to be one employer

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *N. Wilson*.

APPEARANCES: *Elizabeth Mitchell*, *Owen Pettipas* and *Stanley Quin* for the applicant; *Patrick Corless* and *Terrence Warren* for Blastco Corporation; no one appearing for Warren Steeplejacks Limited and Warren Mechanical Limited.

DECISION OF THE BOARD; March 15, 1989

1. The applicant Sheet Metal Workers' International Association, Local 537 ("the union") has applied under subsection 1(4) and section 63 of the *Labour Relations Act* for a declaration that Warren Steeplejacks Limited ("Steeplejacks"), Warren Mechanical Limited ("Mechanical") and Blastco Corporation ("Blastco") be treated as constituting one employer for the purposes of the Act, and a declaration that Blastco is the successor employer in a sale or transfer of a business, or part thereof, from Steeplejacks and Mechanical. The union did not pursue in final argument its request for a declaration of a sale or transfer of a business. Therefore, insofar as this application relates to section 63 of the Act, it is dismissed.

2. Steeplejacks was incorporated March 3, 1975 and performed work in the construction industry until November 1982. It ceased doing business in December 1982, sold off all of its assets to satisfy its major creditor, its bank, and, on November 22, 1986, was dissolved for default in complying with the *Corporations Tax Act*. Mechanical was incorporated October 17, 1979 and performed work in the construction industry until the end of 1981 when it ceased doing business. It was dissolved July 30, 1984 for default in complying with the *Corporations Tax Act*. Terrence Warren, who testified in these proceedings, was the incorporator and a first director of both companies.

3. When Steeplejacks was first incorporated it was performing repair work on church steeples which included repairing their wood-frame structures and slate roofs, plus some painting. Later most of Steeplejacks' work was roofing along with some sandblasting and painting of bridges, industrial buildings and smoke stacks. The majority of its employees were engaged in roofing and the sheet metal work which it did, from time to time, was related to its roofing work. Before Mechanical existed, Steeplejacks also did some installation of industrial equipment in plants. Its major customers were businesses with industrial plants and buildings. Steeplejacks obtained its business by soliciting it directly rather than by bidding on private or public tenders. At some point prior to December 10, 1982, Steeplejacks had a roofing and sheet metal division operating under the name of Warren Roofing and Sheet Metal.

4. Mechanical operated as a mechanical contractor installing equipment in industrial plants and doing flat roofing. It served the same kind of customers as did Steeplejacks, hence Mechanical held no assets of its own, using the assets of Steeplejacks instead. It was an employer

of sheet metal workers, members of the union, and employed other employees in trades similar to those employed by Steeplejacks.

5. Both Steeplejacks and Mechanical had a collective bargaining relationship with the union. Mechanical entered into a voluntary recognition agreement with the union on November 2, 1979 which bound Mechanical to the provincial agreement covering the sheet metal trade in the Province of Ontario. Steeplejacks and its Warren Roofing and Sheet Metal Division entered into a similar agreement on December 10, 1982.

6. Warren admitted that he used Steeplejacks and Mechanical interchangeably to perform construction work. His admission is supported by the fact that Steeplejacks made contributions to the welfare and pension funds of the union during 1979, 1980 and 1981 at a time when Mechanical was under a collective agreement obligation to do so, but Steeplejacks was not.

7. Blastco was incorporated January 26, 1983 and began performing work in April or May of that year. Its major business is sandblasting and painting of elevated water tanks which involves the use of special scaffolding and rigging equipment and specialized, mobile sandblasting equipment. Ninety-five per cent of its customers are municipalities which tender out the work and Steeplejacks obtains it by bidding on the tenders. Two or three of the painters who had worked for Steeplejacks were hired by Blastco when it first started its operations. It performed only sandblasting and painting work until the latter part of 1987 when it performed a job for Ontario Hydro at its Nanticoke Generating Station. The job had been obtained by bidding for the work, apparently in the summer of 1987. The work involved the installation of roof fans and wall louvers in three or four precipitators at the generating station. The union claims that the cutting of the roof openings for the fans, the wall openings for the louvers, the framing for the louvers, the setting in of the fans and louvers and all related roofing and flashing work was work of the sheet metal trade and work to which the provincial agreement for that trade would apply.

8. As the Board has noted above, Warren was the incorporator and a first director of Steeplejacks and Mechanical. He was also their president. Likewise, Warren is the incorporator, a first director and president of Blastco. He was also the person who, for all three companies, was responsible for the day to day management, for soliciting business, whether directly or by bidding and for supervising the work which they were successful in getting.

9. The objects of Mechanical and Blastco set forth in their respective letters patent, while differently worded, show the main purpose or business of each to be that of a contractor or builder. While Steeplejacks' objects in its letters patent do not explicitly refer to Steeplejacks carrying on the business of a contractor or builder, it is undisputed that its main business was that of a contractor in the construction industry performing the work described in paragraph 4.

10. Subsection 1(4) of the *Labour Relations Act* provides as follows:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The Board described the statutory purpose of the subsection in the following terms in its decision in *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945, at paragraph 12:

...

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now section 63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another.

...

11. The wording of the subsection sets out three pre-conditions which must be satisfied in order for the Board to have the discretion to treat more than one corporation, individual, firm, syndicate or association or any combination thereof as constituting one employer for the purposes of the Act. They are:

- (1) there must be more than one corporation, individual, firm, syndicate or association or any combination thereof;
- (2) the activities or businesses of two or more of those entities must be under common control or direction; and
- (3) the entities concerned must carry on related or associated activities or businesses.

The parties are agreed that Steeplejacks and Mechanical had been under the common control or direction of Warren when they operated and Blastco was under his control or direction. They agreed, therefore, that all three companies were under common control or direction for purposes of subsection 1(4), and the Board so finds. Counsel for the respondent takes the position that the other two preconditions have not been satisfied on the facts of this case.

12. He takes the position that there are not two or more entities because, in order for that criterion to be satisfied, there would have to be at least two entities known in law to exist at the relevant time. That relevant time, he claims, would be either when the businesses were being carried on or when the circumstances arose which caused the application to be made with the Board. On the facts of this case, he contends, Steeplejacks and Mechanical had both ceased carrying on business before Blastco was incorporated and before it started to carry on business. Furthermore, by the time Blastco engaged in the sheet metal work which attracted the attention of the union, Steeplejacks and Mechanical had been dissolved. He argues that the words in subsection 1(4) "whether or not simultaneously" does not cure this problem because those words relate only to the carrying on of the activities or businesses and not to the existence of the entities.

13. Counsel for Blastco also takes the position that the activities or businesses of Steeplejacks, Mechanical and Blastco are not related because Blastco carries on a specialized business of sandblasting and painting elevated water towers, a business which requires specialized equipment and skills, serves different customers and is obtained by different means than was the case with Steeplejacks and Mechanical. Furthermore, while sheet metal work was only an incidental part of the business of Steeplejacks and Mechanical, it was even more so for Blastco which had performed sheet metal work on only one occasion since it began business.

14. The Board will deal first with whether Blastco and Steeplejacks and Mechanical, or either of them, carry on associated or related activities or businesses within the meaning of subsection 1(4) of the Act. The Board has interpreted the words “associated or related activities or businesses” in a manner consistent with the broad remedial purpose of subsection 1(4). In this respect we find it useful to look at what the Board has said about their interpretation in two of its decisions. First, in *Brant Erecting, supra*, at paragraph 15 the Board had the following to say:

...

The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

Later, in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, the Board commented about the wide variety of commercial activities to which the section applies and of the impact of that scope on the interpretation of the words “associated or related activities or businesses”:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature (“associated” or “related”, “activities” or “businesses”), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer’s main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine, Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are “unrelated” - particularly if they are being undertaken at the same time and involve common managerial or employee skills....

15. Blastco Counsel claims that it would be unreasonable for the Board to conclude that Blastco carried on related activities or businesses with Steeplejacks and Mechanical or either of them because of the differences in the type of work undertaken by them. In this respect, he relies on the fact that, in contrast with the work of Steeplejacks and Mechanical described at paragraphs 3 and 4, Blastco is a specialty contractor doing sandblasting and painting of elevated water towers and its only venture into any other kind of construction work was the Ontario Hydro project. He also relies on the fact that Steeplejacks and Mechanical had served primarily industrial customers and had obtained their work by direct solicitation rather than through the bid system, whereas ninety-five per cent of Blastco’s customers were municipalities from which Blastco obtained business by bidding on public tenders.

16. The Board is not persuaded that those differences are significant in face of the remedial purpose of subsection 1(4) of the Act. The main business carried on by each of the the companies may have differed, but not enough to prevent Warren from having used Steeplejacks and Mechanical interchangeably. In fact, from the evidence that, before Mechanical existed, Steeplejacks did some equipment installation in industrial plants, work which was Mechanical’s main business, it may be inferred that Mechanical grew out of that part of Steeplejacks’s business. Steeplejacks and Mechanical also shared roofing work and sheet metal work in common. There is no doubt, therefore, that Steeplejacks and Mechanical carried on associated or related activities or businesses and

the contrary position was not argued. The main objects of Mechanical and Blastco as set out in their respective letters patent are the same and, even though Steeplejacks' letters patent did not explicitly refer to the same objects, it conducted business as though it shared those objects. While it can be said that the main business of each of the three companies set Blastco apart from Steeplejacks and Mechanical, the construction industry activities of Steeplejacks and Mechanical jointly and of Blastco had a common meeting ground (to borrow a term from the Board's decision in *Elmont Construction* referred to above at paragraph 14 in the quotation from *Plastina*) in sheet metal work and sandblasting and painting. In this respect, the Board agrees with the comments quoted from the decision in *Plastina, supra*. That is, from time to time firms engaged in the construction business can become involved with relative ease in various sectors, subdivisions, phases or specialized kinds of construction work, depending largely upon the business opportunities which present themselves. We agree also with the statement in *Plastina* that the Board should not readily hold those activities to be "unrelated" just because they take place in different sectors, subdivisions, phases or specialized kinds of construction work, particularly when the work is undertaken under common managerial control or direction. In addition, for each company, Warren played or plays the major role in day to day management, in soliciting business, whether directly or by bidding, and in supervising the work performed by each company. Accordingly, the Board finds that Warren Steeplejacks Limited, Warren Mechanical Limited and Blastco Corporation carry on associated or related activities or businesses within the meaning of subsection 1(4) of the *Labour Relations Act*.

17. The Board turns now to the question of whether there was "...more than one corporation, individual, firm, syndicate or association or any combination thereof...". As the Board understands the argument of counsel for Blastco, he construes subsection 1(4) to require that there be at least two legal entities which have existed contemporaneously while one or the other of them was carrying on the activity or business which is said to be associated or related, even though the activity or business is not carried on simultaneously. This, according to counsel, is because the phrase "whether or not simultaneously" modifies the phrase "[w]here associated or related activities or businesses are carried on" and not the phrase "by or through more than one corporation, individual, firm, syndicate or association or any combination thereof". Therefore, even if the activities or businesses carried on by Steeplejacks and Mechanical were seen to be related to those later carried on by Blastco, for subsection 1(4) to apply to them they would have had to exist in law when those activities or businesses were being carried on by either one of them. Therefore, the argument goes, since Steeplejacks had ceased carrying on business in December 1982 before Blastco was incorporated on January 26, 1983, and since Steeplejacks had been dissolved by summer 1987 when Blastco began bidding on sheet metal work, the two companies did not co-exist at the relevant time. This same result, of course, would apply to Mechanical which ceased carrying on business at the end of 1981 and was dissolved on July 30, 1984. In the result, according to counsel for Blastco, at any of the relevant times there was not "...more than one corporation, individual, firm, syndicate or association or any combination thereof, ...". That result makes sense, counsel argues, because the purpose of subsection 1(4) is to preserve bargaining rights rather than to extend them. If two entities do not co-exist, there is no threat to bargaining rights and no need for the protection of the subsection.

18. The Board disagrees with counsel's interpretation of subsection 1(4). Its provisions expressly apply in circumstances where the associated or related activities or businesses are *not* carried on simultaneously, as long as they are carried on by more than one corporation, individual, firm, syndicate or association or any combination thereof under common control or direction. The "carrying on" has to be by or through at least two of those kinds of entities but, if it is unnecessary for them to do the "carrying on" simultaneously, surely then they do not need to exist simultaneously as legal entities. As the Board noted in *Brant Erecting, supra*, the phrase "whether or not

simultaneously” reflects legislative recognition that the legal vehicles which carry on the activities or businesses will not operate simultaneously. Considering the broad, remedial nature of the subsection, it would substantially narrow that legislative recognition were the Board to construe the subsection to require the entities to exist in law contemporaneously as Blastco counsel argues. For these reasons, in the Board’s view, a fair reading of the subsection does not require the contemporaneous existence of any two or more corporations, individuals, firms, syndicates or any combination of them. Such a reading, is compatible with the conclusion reached by the Board in *Sommerville Construction Ltd.*, [1988] OLRB Rep. Oct. 1022. In that decision, the Board held that two companies carried on related businesses even though one of them came into existence five and a half years after the other had been dissolved for the same reasons that Steeplejacks and Mechanical were dissolved. While the Board in *Sommerville* did not have to deal with the same argument as made herein by Blastco counsel, it was answering the argument that the two companies could not be carrying on related activities or businesses if one had ceased to exist five and a half years before the other one came into existence. In that factual context, it is implicit in the Board’s decision that the Board interpreted subsection 1(4) of the Act as not requiring the two entities to exist in law at the same time.

19. Even if the language of subsection 1(4) would bear Blastco counsel’s interpretation, the Board would not adopt it. That interpretation would allow bargaining rights to be extinguished in circumstances where a company is dissolved on one day and on the next day a new one, carrying on the same business as the first, is started by the person or persons who had control or direction of the first company. That would frustrate totally the labour relations purpose of the subsection.

20. Finally, and in any event, the factual basis for Blastco counsel’s argument is flawed. Steeplejacks and Blastco did co-exist in law from January 26, 1983 when Blastco was incorporated until December 22, 1986 when Steeplejacks was dissolved. The only “gap” which existed was that period between November 1982, when Steeplejacks stopped performing work, and April or May 1983, when Blastco began to perform work. The construction work performed by Mechanical until the end of 1981, by Steeplejacks until the end of November 1982 and the construction work performed by Blastco since January 1983 is the activity and business which the Board has found to be related. Subsection 1(4) does not require them to be carried on simultaneously in order for the Board to acquire discretion under subsection 1(4) to declare that the entities be treated as constituting one employer for the purposes of the Act. The only gap which would be relevant to counsel’s argument would be a gap in the legal existence of the two entities and that circumstance does not exist on the facts of this case.

21. For these reasons, and in all of the circumstances of this application, the Board finds that Warren Steeplejacks Limited, Warren Mechanical Limited and Blastco Corporation carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the *Labour Relations Act*. Therefore, the Board has the discretion to declare that they be treated as constituting one employer for the purposes of the Act.

22. Blastco counsel argues that the Board should not exercise that discretion because, if it does, it would be extending the union’s bargaining rights rather than preserving them. This is because Blastco has operated for five years without affecting the union’s bargaining rights. Thus, for five years, the union has not needed the protection afforded by the subsection. In such circumstances, counsel argues, the union should not be allowed to use subsection 1(4) to “come in the back door”. Rather it should be required to organize and sign into membership Blastco’s existing employees. That argument might be more persuasive if the union had been less than diligent in pursuing its bargaining rights. Even counsel for Blastco admits that the union has not sat on its

rights, but has sought to protect them the very first time that Blastco employed persons to do sheet metal work.

23. Finally, this is not a situation in which two companies were operating in parallel and the union was aware of the existence of the second company but did nothing to protect its bargaining rights with the first one. Accordingly, the Board is satisfied that it should declare that Warren Steeplejacks Limited, Warren Mechanical Limited and Blastco Corporation are to be treated as constituting one employer for the purposes of the *Labour Relations Act* and that Blastco Corporation is bound by and must recognize the bargaining rights held by the Sheet Metal Workers International Association, Local 537 in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and the provincial agreement to which those bargaining rights attach.

24. In the result, insofar as this application relates to section 63 of the *Labour Relations Act*, for the reasons given earlier in this decision, the application is dismissed and insofar as it relates to subsection 1(4) of the Act it succeeds.

COURT PROCEEDINGS

0554-86-M; 0723-86-M (Court File No. 231/88) United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Labourers International Union of North America, Local 183, The Toronto Housing Labour Bureau, Philmor Developments Limited, Mor-Alice Construction Limited, Greenpark Homes, Heron Homes, Bramalea Limited, Victoria Wood Development Corporation Inc., Two Star Construction Ltd., **Dellbrook Homes**, Michael Reilly, and the Ontario Labour Relations Board, Respondents

Judicial Review - Practice and Procedure - Unfair Labour Practice - Complaint by Carpenters Union that Labourers Union negotiated collective agreements which contained subcontracting clauses requiring home builders to subcontract work to contractors in contractual relations with Labourers Union notwithstanding that the Union did not represent any of the employees employed by the home builders - Board declining to inquire into complaint due to delay in bringing matter on for hearing - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board wrongfully declined to exercise its jurisdiction and failed to observe the rules of natural justice in refusing to inquire into the complaint - Judicial review dismissed by Divisional Court

Board decision found at [1988] OLRB Rep. Feb. 125.

High Court of Justice, Divisional Court, Southey, Saunders and Gray JJ., March 13, 1989:

Southey J.: In our judgment, the Board gave sufficient grounds in para. 19 of its Decision for exercising its discretion under s.89(4) not to proceed with the application. Those grounds were:

- 1) the failure of the Carpenters to take steps to bring the matter on for hearing between the date of their letter of Nov. 8, 1984, and June, 1986. Their

earlier letter was not acknowledged by the Board, and brought the response from the Labourers that the matter should not have proceeded then because of *laches* and unreasonable prejudicial delay. That response went unanswered.

2) bargaining relationships that have occurred since 1981, when the alleged contraventions first occurred, which led the Board to conclude that it would not be in the best interests of sound labour relations to proceed "at this belated juncture".

The extensive documentary evidence of applications, counter-applications, settlements and adjournments provided sufficient evidence to support the Board's decision on those grounds.

We do not agree with Mr. Wray's submission that the reference to the death and resignation from the Board of two members of the original panel is irrelevant, in light of the fact that such panel heard a full day of oral evidence in July, 1983. We think it unlikely that such ground would ever be sufficient by itself, however.

The Board's decision is protected by a privative clause. We do not think it was patently unreasonable.

The application is dismissed. The Labourers and the Bureau will have their costs. Counsel for Two Star was permitted to withdraw at the outset with no order as to costs. Counsel for the Board does not ask for costs.

1949-86-OH (Court File No. 405/88) Douglas Lloyd, Applicant v. The Crown in Right of Ontario (Ministry of Community and Social Services) and Ontario Labour Relations Board, Respondents

Charter of Rights and Freedoms - Health and Safety - Judicial Review - Youth services officer at secured custody facility refusing to work at another location at the facility because of his belief that he would be putting his co-workers in danger - Officer completing shift at his regular location and receiving reprimand letters - OHSA providing that such persons do not have the right to refuse work which would endanger their or co-workers' safety - Board dismissing complaint - Worker cannot refuse work on the basis that some other provision in the Act creates a right to disobey the employer - Officer's actions constituting insubordination - Board not exercising discretion to substitute a different penalty - Officer bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law and exceeded its jurisdiction in its interpretation of the OHSA and that the provision in the OHSA by which he was excluded from the right to refuse unsafe work was contrary to s.15, the equality provision, of the Canadian Charter of Rights and Freedoms - Judicial review dismissed by Divisional Court

Board decision found at [1988] OLRB Rep. Jan. 50.

High Court of Justice, Divisional Court, Callaghan, Gray, and Ewaschuk JJ., March 10, 1989:

Callaghan J.: In this matter, it is agreed that the standard of review is that of patent unreasonable-

ness, this being a case where the Board is protected by a privative clause. i.e., ss.106 and 108 of the *Ontario Labour Relations Act* incorporated by virtue of s.24(4) of the *Occupational Health and Safety Act* (hereinafter referred to as the "Act"). The Board in its decision assessed the purposes of ss.17 and 23 of the Act in light of the statute as a whole, (see the Board decision para.16 *et seq.*)

In our view, the Board was correct, in reading these two sections together and giving meaning to each. That interpretation was not patently unreasonable. Nor does the Board's interpretation add a condition or qualification to the express wording of s.17(2)(b) of the Act or take into consideration matters that could be considered extraneous. The Board did not err in the use of distinguishing criteria between a worker acting under orders of a superior and acting on his own discretion, having regard to the legislation which deals with endangering of self or a co-worker in two different contexts, that is to say, s.17(2)(b) and s.23(3)(c) of the Act.

As to the Charter submission, we are satisfied that this Court in this case has jurisdiction to consider the matter under the *Judicial Review Procedure Act* s.2(1)(2), the Board, having exercised a statutory power.

S.23(1)(c) of the Act does not, in our view, infringe s.15(1) of the Charter. It relates to occupational characteristics rather than the personal characteristics of the employees (see *The Law Society of British Columbia et al v. Andrews et al* - S.C.C. Feb. 2nd 1989) Nor is s.23(1)(c) over-broad, having regard to the nature of the institutions to which it is applied. Even if s.15(1) permits challenge beyond personal characteristics, the impugned section in our view meets a legitimate government objective. It is clear that the section is dealing with circumstances of an occupation where risking one's health and safety is one of the primary requirements, and if one were to allow individuals in such occupations to refuse work which involved a risk of injury, the important functions which they are obliged to perform would remain unfulfilled. Having regard to that objective, the section is a proportionate response, within the meaning of that term as used in the case of *R. v. Oakes* [1986] 1 S.C.R. 103.

Accordingly, in our view, the application must be dismissed.

We are leaving open the fundamental question of whether the Court will as a general rule hear charter issues not raised before the Tribunal. We note that the instant case arose before the decision of this Court in *Re Cutty [sic] Chicks*, November 2nd, 1988. Thus, the record of the Charter issue herein was understandably incomplete, and we recognize that normally such issues must rest on a factual record.

Application dismissed. No order as to costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1557-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. R D S Royal Drywall Systems Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)" (*Having regard to the agreement of the parties*)

1861-88-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Leeds & Grenville County Board of Education (Respondent)

Unit: "all employees of the respondent in the United Counties of Leeds and Grenville in the educational support services group, save and except superintendent, persons above the rank of superintendent, plant, business and personnel staff and employees in bargaining units for which any trade union held bargaining rights as of November 2, 1988 the date of application" (19 employees in unit)

1899-88-R: Labourers' International Union of North America, Local 527 (Applicant) v. Beaver Road Builders Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell save and except non-working foremen and persons above the rank of non-working foreman" (44 employees in unit)

1911-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Beaver Road Builders Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

1912-88-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Beaver Road Builders Ltd. (Respondent)

Unit: "all truck drivers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1931-88-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Action Electrical Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (36 employees in unit)

1953-88-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Covello Brothers Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Intervener)

Unit: “all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand (Board Area 5), save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1990-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Country Homes (King) Ltd. (Respondent) v. Labourers International Union of North America, Local 183 (Intervener)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2001-88-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre of Cornwall, Ontario (Respondent)

Unit #1: “all lay registered and graduate nurses employed by the respondent in a nursing capacity at its Macdonell Hospital in Cornwall, save and except Nurse Managers, those above the rank of Nurse Manager and those regularly employed for not more than 24 hours per week” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all lay registered and graduate nurses regularly employed for not more than 24 hours per week by the respondent in a nursing capacity at its Macdonell Memorial Hospital in Cornwall save and except Nurse Managers and those above the rank of Nurse Manager” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2082-88-R: Aluminum, Brick & Glass Workers International Union (Applicant) v. A. P. Green Refractories (Canada) Ltd. (Respondent)

Unit: “all employees of the respondent in its engineering workshop in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of November 28, 1988” (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2171-88-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. P. B. Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all other sectors within a radius of 81 kilome-

ters (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

2219-88-R: Canadian Union of Public Employees (Applicant) v. The Espanola Board of Education (Respondent)

Unit: “all employees of the respondent in the District of Sudbury employed as educational assistants, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (14 employees in unit) (*Having regard to the agreement of the parties*)

2273-88-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses (Lanark Branch) (Respondent)

Unit: “all registered and graduate nurses employed by the respondent in Carleton Place, save and except Director of Nursing and persons above the rank of Director of Nursing” (19 employees in unit) (*Having regard to the agreement of the parties*)

2295-88-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Roth-Juschka Holdings Ltd. c.o.b. as Bluewater Food Market (Respondent)

Unit #1: “all employees of the respondent Township of Moore, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff, persons employed in the meat department, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Township of Moore regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff” (30 employees in unit) (*Having regard to the agreement of the parties*)

2302-88-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre, Cornwall, Ontario (Respondent)

Unit #1: “all lay paramedical employees of the respondent at its Hotel Dieu Hospital in Cornwall, save and except department heads, persons above the rank of department head, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of December 20, 1988” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all lay paramedical employees of the respondent at its Hotel Dieu Hospital in Cornwall regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head and employees in bargaining units for whom any trade union held bargaining rights as of December 20, 1988” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2313-88-R: Office & Professional Employees International Union, (Applicant) v. Worker Education Centre (A joint project of the Hamilton & District Labour Council and McMaster University Labour Studies Program) (Respondent)

Unit: “all employees of the respondent in the City of Hamilton, save and except program co-ordinator and persons above the rank of program co-ordinator” (15 employees in unit) (*Having regard to the agreement of the parties*)

2314-88-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre, Cornwall, Ontario (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent at its Hotel Dieu Hospital in Cornwall save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, office and clerical staff, paramedical staff, persons regularly employed for not more than 24 hours per

week, students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of December 21, 1988.” (124 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent at its Hotel Dieu Hospital in Cornwall regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, office and clerical staff, paramedical staff, and employees in bargaining units for whom any trade union held bargaining rights as of December 21, 1988” (47 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: “all office and clerical employees of the respondent at its Hotel Dieu Hospital in Cornwall save and except supervisors, persons above the rank of supervisor, secretary to the Executive Director, secretary to the Director of Human Resources, accountant, assistant accountant, payroll officer, computer co-ordinator, budget co-ordinator, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of December 21, 1988” (40 employees in unit) (*Having regard to the agreement of the parties*)

Unit #4: “all office and clerical employees of the respondent at its Hotel Dieu Hospital in Cornwall regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, secretary to the Executive Director, secretary to the Director of Human Resources, accountant, assistant accountant, payroll officer, computer co-ordinator, budget co-ordinator and employees in bargaining units for whom any trade union held bargaining rights as of December 21, 1988” (28 employees in unit) (*Having regard to the agreement of the parties*)

2374-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. St. Clair Forms Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Blenheim, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

2393-88-R: Teamsters, Local No. 879 (Applicant) v. Airshield Inc. (Respondent)

Unit: “all employees of the respondent in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (23 employees in unit) (*Having regard to the agreement of the parties*)

2395-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Gold Star Painting Co. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2418-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Peter Gorman & Sons (Wholesale) Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Peterborough, save and except foremen/managers, persons above the rank of foreman/manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

2438-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Avenue Mechanical (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

2439-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Verdiroc Holdings Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2440-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. West Parry Sound Board of Education (Respondent)

Unit: “all teacher aides of the respondent in the District of Parry Sound, save and except superintendents, persons above the rank of superintendent, persons regularly employed for not more than 24 hours per week and those persons for whom any trade union held bargaining rights as of January 6, 1989” (34 employees in unit) (*Having regard to the agreement of the parties*)

2452-88-R: Teamsters, Chemical, Energy & Allied Workers, Local 424, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Schwartz Chemical of Canada Ltd. (Respondent) v. Group of Employee (Objector)

Unit: “all employees of the respondent at Pickering, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, students employed in the school vacation period and persons employed on a regular basis for 24 hours a week or less” (13 employees in unit) (*Having regard to the agreement of the parties*)

2458-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Arcadia Group Investments Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2459-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Erskine Building Corporation (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2463-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Barmish Inc. (Respondent) v. Amalgamated Clothing & Textile Workers Union (Intervener)

Unit: “all employees of the respondent at Napanee, save and except supervisors, persons above the rank of supervisor, job trainers, industrial engineers, cycle checkers, designers, truck drivers, office and sales staff, persons regularly employed for not more than 24 hours per week” (120 employees in unit) (*Having regard to the agreement of the parties*)

2467-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Avenue Struct-form Joint Venture (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

2478-88-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Board of Health of the Corporation of the County of Huron (Respondent)

Unit: “all paramedical employees of the respondent in Huron County, save and except supervisors, persons above the rank of supervisor, and students employed during school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2544-88-R: United Steelworkers of America (Applicant) v. Neelon Casting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in Sudbury, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of January 12, 1989” (27 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all office and clerical employees of the respondent in Sudbury, save and except supervisors, persons above the rank of supervisor, secretary to the managers, secretary to the Personnel Manager, accountant, computer programmer, sales staff and employees in bargaining units for which any trade union held bargaining rights as of January 1989” (5 employees in unit) (*Having regard to the agreement of the parties*)

2559-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Valerio Construction (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2560-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. 591578 Ontario Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (30 employees in unit)

2578-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. X-Act Investment Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2586-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Paintright Decorators (A Division of 437583 Ontario Ltd.) c.o.b. as Paintall Decorators (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2587-88-R: Ontario Public Service Employees Union (Applicant) v. Cambridge Memorial Hospital (Respondent)

Unit: “all medical laboratory and radiology technologists, technicians and assistants employed by the respondent in the City of Cambridge, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except Chief Technologist, persons above the rank of Chief Technologist, members of the medical and nursing professions, clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1989” (19 employees in unit) (*Having regard to the agreement of the parties*)

2600-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Malfar Mechanical Inc. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2607-88-R: Service Employees Union, Local 183 (Applicant) v. Union Cleaners Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2609-88-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Niagara (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Niagara regularly employed for not more than twenty-four hours per week, in the Public Works Department who are engaged in maintenance ser-

vices and operations and all office and clerical employees of the corporation, save and except Foremen and those above the rank of Foreman, Professional Engineers, Department Heads and Deputy Department Heads, Administrative Assistants, Assistant Director Supply & Services, Supervisor of Data Processing, Budget Officer, Assistant Director Fiscal Studies & Administration, Assistant Director Accounting, Assistant to the Regional Clerk, Managers and Assistant Directors of Social Services, Staff Training Officers, Traffic Coordinator, Roadways Services Supervisor, Technologists, Ontario Land Surveyor, Employees of the Personnel Department (5), Planners; Confidential Secretaries of each of the following: Regional Chairman, Chief Administrative Officer, Regional Solicitor (2), Director of Personnel, Director of Finance, Director of Social Services, Director of Engineering, Director of Planning and Development, Regional Clerk (2), Environmental Services Engineer, Engineering Services Engineer, Water Treatment & Pollution Control Division Engineer, Transportation Services Engineer, Health & Safety Officers, Manager & Coordinator of Health & Safety Services, Risk Management Manager, Students employed on a Co-operative Training Schedule, and persons for whom any trade union held bargaining rights as of the date of this application" (80 employees in unit) (*Having regard to the agreement of the parties*)

2611-88-R: Office & Professional Employees International Union (Applicant) v. Centennial Credit Union Ltd. (Respondent)

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except manager, persons above the rank of manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

2618-88-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Admiral Linen Supply Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, drivers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

2621-88-R: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Western Industrial Services Ltd. (Respondent)

Unit: "all journeymen insulators and asbestos workers and apprentice insulators and asbestos workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen insulators and asbestos workers and apprentices insulators and asbestos workers in the employ of the respondent in all other sectors in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2636-88-R: Sudbury Mine Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine Mill & Smelter Workers (Applicant) v. MacMillan Bloedel Building Materials Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2647-88-R: Ironworkers District Council of Ontario (Applicant) v. Torbram Installations Ltd. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2650-88-R: Ontario Nurses' Association (Applicant) v. Windsor Coalition for Development Health Care Associates (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Chateau Park Nursing Home, in the City of Windsor, save and except Director of Nursing and persons above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*)

2660-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Perimeter Transportation Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

2668-88-R: Service Employees' International Union, Local 210 affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Auxiliary of Windsor Western Hospital Centre IODE (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week" (10 employees in unit) (*Having regard to the agreement of the parties*)

2670-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Guido's Plumbing & Mechanical Contracting Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2681-88-R: Hotel Employees Restaurant Employees Union (Applicant) v. Chestnut Park Hotel Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (43 employees in unit) (*Having regard to the agreement of the parties*)

2710-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Rowad Pipeline Company Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2797-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dinacon Construction Co. Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1998-88-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses Metropolitan Toronto Branch (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (337 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	383
Number of persons who cast ballots	278
Number of ballots marked in favour of applicant	149
Number of ballots marked against applicant	129

2216-88-R: United Steelworkers of America (Applicant) v. Gerber (Canada) Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all stationary engineers employed by the respondent at its steam plant in the City of Niagara Falls, save and except the plant engineer and persons above the rank of plant engineer" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

2271-88-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener)

Unit: "all employees of the respondent at Riverbend Place, extended care facility in the City of Cambridge, save and except Director of Nursing, persons above the rank of Director of Nursing, professional medical staff, registered and graduate nurses and office staff" (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	46
Number of persons who cast ballots	31
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intevener	5

Bargaining Agents Certified Subsequent to a Post Hearing Vote

1549-88-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union (AFL:CIO:CLC) (Applicant) v. Northfield Metal Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Waterloo, save and except foremen, persons above the rank of foremen, office and sales staff" (300 employees in unit)

Number of names of persons on list as originally prepared by employer	305
Number of persons who cast ballots	297

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	278
Number of segregated ballots cast by persons whose names appear on voters' list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	11
Number of ballots marked in favour of applicant	151
Number of ballots marked against applicant	134
Ballots segregated and not counted	12

2101-88-R: Ontario Nurses' Association (Applicant) v. The Corporation of the County of Hastings (Respondent) v. The Canadian Union of Public Employees (Intervener)

Unit: "all registered nurses of the respondent at Hastings Manor in the Township of Sydney, save and except the assistant director of nursing and those persons above the rank of assistant director of nursing" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	0

Applications for Certification Dismissed Without Vote

2042-88-R: United Steelworkers of America (Applicant) v. Erdle Perforating Co. Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1276-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. 504578 Ontario Ltd. o/a Murray Collard Fisheries (Respondent)

1765-86-R: Energy & Chemical Workers Union (Applicant) v. Taro Pharmaceuticals Inc. (Respondent)

2365-88-R: International Union of Allied Novelty & Production Workers, Local 905 (Applicant) v. Dominion Plastics Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	48
Number of persons who cast ballots	41
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	37

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2323-86-R: Ontario Nurses' Association (Applicant) v. Richmond Nursing Home (Respondent) v. Group of Employees (Objectors)

Unit: "all registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the respondent in Amherstburg, Ontario, save and except the director of nursing and those above the rank of director of nursing" (6 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

1187-88-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Careful Hand Laundry & Dry Cleaners Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in cleaning facility in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, drivers, counter staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	40
Number of persons who cast ballots	35
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	32

Applications for Certification Withdrawn

1233-88-R: Canadian Paperworkers Union (Applicant) v. Easy-Plan Industries Ltd., 312211 Ontario Ltd. and Fournier Stands Mfg. of Canada Ltd. (Respondents)

1632-88-R: Canadian Union of Public Employees (Applicant) v. St. Joseph Nursing Home (Respondent)

1972-88-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Beaver Road Builders Ltd. (Respondent)

2063-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. March Aluminium (Respondent)

2065-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Manville Aluminium & Contracting Ltd. (Respondent)

2137-88-R, 2138-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dominion Sheet Metal & Roofing (Respondent)

2139-88-R, 2140-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ontario Siding Co. (Respondent)

2283-88-R, 2284-88-R: Canadian Paperworkers Union (Applicant) v. Easy-Plan Industries Ltd., 312211 Ontario Ltd. and Fournier Stands Mfg. of Canada Ltd. (Respondents)

2291-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Wentworth County Board of Education (Respondent)

2303-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Chimo Hotel (Respondent)

2371-88-R: Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire séparée (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent)

2372-88-R: Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire séparée (Applicant) v. Carleton Roman Catholic Separate School Board (Respondent)

2392-88-R: Energy & Chemical Workers Union (Applicant) v. V Plus Service Station (A Division of 133950 Canada Inc.) (Respondent)

2623-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Wexford Steel Inc. (Respondent)

2665-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Foam & Cushion Division (A Division of Woodbridge Foam Corporation) (Respondent)

2667-88-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Head Construction & Supply Co. Ltd. (Respondent)

2757-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. Jaltas Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2072-88-FC: International Union of Operating Engineers, Local 793 (Applicant) v. Atcost Soil Drilling Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2065-86-R: International Union of Operating Engineers, Local 796 (Applicant) v. Metropolitan Life Insurance Company (Respondent #1) v. Allen Maintenance Ltd. (Respondent #2) (*Dismissed*)

0019-87-R: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ellis-Don Ltd.; and Aztec Contracting Inc. (Respondents) v. Labourers' International Union of North America, Local 1059 (Intervener) (*Granted*)

0462-88-R: Retail, Wholesale & Department Store Union, Local 582 (Applicant) v. 705903 Ontario Inc. c.o.b. as The Jolly Friar Brasserie & Brew Pub (Respondents) (*Withdrawn*)

0749-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Widcor Ltd. and Green-King Ltd. (Respondents) (*Granted*)

2592-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rex Forming Ltd. Star-Wall Concrete Forming Ltd. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

0019-87-R: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ellis-Don Ltd.; and Aztec Contracting Inc. (Respondents) v. Labourers' International Union of North America, Local 1059 (Intervener) (*Granted*)

0462-88-R: Retail, Wholesale & Department Store Union, Local 582 (Applicant) v. 705903 Ontario Inc. c.o.b. as The Jolly Friar Brasserie & Brew Pub (Respondents) (*Withdrawn*)

0749-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Widcor Ltd. and Green-King Ltd. (Respondents) (*Granted*)

1627-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. John Bull Chop House at the Skyline-Triumph Hotel (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1512-88-R: Ann Crichton (Applicant) v. United Food & Commercial Workers International Union, Local 175 - AFL:CIO:CLC (Respondent) v. Cancoil Thermal Corporation (Intervener)

Unit: "all office, clerical and technical employees of Cancoil Thermal Corporation in the County of Fronte-

nac, save and except sales and marketing staff, professional engineers and managers" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	6

1864-88-R: Jeffrey A. Babineau (Applicant) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Respondents) v. Dollo Bros. Food Market Ltd. (Intervener)

Unit #1: "all employees of the intervener in the Township of Anson, Hindon and Mindon, Ontario, save and except store manager, persons above the rank of store manager, produce manager, bookkeeper, full-time meat department employees, persons regularly employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation periods" (18 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	18
k1Number of persons who cast ballots	17
Number of ballots marked in favour of United Food & Commercial Workers International Union, Local 175	5
Number of ballots marked against United Food & Commercial Workers International Union, Local 175	12

Unit #2: "all employees of the intervener in the Township of Anson, Hindon and Mindon, Ontario, regularly employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation periods, save and except store manager, persons above the rank of store manager, produce manager and bookkeeper"(20 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	17
Number of ballots marked in favour of United Food & Commercial Workers International Union, Local 175	6
Number of ballots marked against United Food & Commercial Workers International Union, Local 175	11

1907-88-R: Ted Ross, Member, Local 2447 C.U.P.E. (Applicant) v. The Canadian Union of Public Employees (Respondent)

Unit: "all office and clerical employees at the Ottawa Branch working in Blood Donor Recruitment, save and except the Director and persons above the rank of Director, professional staff, technical personnel, accountant, building superintendent, secretary to the Executive Director, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the Canadian Red Cross Society (Blood Transfusion Service) and the Canadian Red Cross Blood Transfusion Service Employees' Association" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

1997-88-R: Stewart N. Robertson (Chapel Chairperson, Representing The Brampton Times Chapel) (Applicant) v. The Toronto Typographical Union, Local 91 (Respondent) v. The Brampton Times (Intervener) (2 employees in unit) (*Granted*)

2099-88-R: John Claridge (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Falconwin Property Management (Intervener) (*Withdrawn*)

2383-88-R: Doris Abbot (Applicant) v. United Steelworkers of America (Respondent) v. Metro Industrial Textiles Inc. (Metro Industrial Division of Canadian Uniform Ltd.) (Intervener) (*Withdrawn*)

2388-88-R: Lorne Day and Bill Crimm (Applicants) v. Triple A Union of Drivers & General Workers (Respondent) v. Transwares Management Inc. (Intervener) (*Withdrawn*)

2427-88-R: Ron Kush (Applicant) v. United Steelworkers of America, Local 5264 (Respondent) v. Thor Industries Canada Ltd./Lteüe (Intervener) (2 employees in unit) (*Granted*)

2573-88-R: Linda Scott (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Birchwood Terrace Nursing Home Inc. (Intervener) (*Withdrawn*)

2606-88-R: Mr. Gary Yott (Applicant) v. Teamsters Local Union 938 (Respondent) (*Withdrawn*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

1537-88-M: Knob Hill Farms Ltd. (Employer) v. United Food & Commercial Workers Union, Local 206 (Trade Union) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2597-88-U: The Corporation of the City of Cornwall (Applicant) v. Amalgamated Transit Union, Local 946 and Messrs. Bill Wilson, Jack Macdonald, Rheal Emmell on their behalf and on behalf of the Union and Messrs. Ray Scobie and Terry Mallette (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2354-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Applicant) v. Del Equipment Ltd., Del Hydraulics Ltd. and Edinburgh Electric Ltd. (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2064-86-U: International Union of Operating Engineers, Local 796 (Complainant) v. Metropolitan Life Insurance Company (Respondent) (*Dismissed*)

3097-86-U: International Union of Operating Engineers, Local 796 (Complainant) v. Allen Maintenance Ltd. (Respondent) (*Dismissed*)

1036-87-U: Mark Carter and Brad Carter (Complainants) v. Sheet Metal Workers' International Association, Local 539 (Respondent) v. Imperial Insulation & Roofing (1982) Ltd. (Intervener) (*Dismissed*)

3542-87-U, 0030-88-U, 0732-88-U: Canadian Paperworkers Union (Complainant) v. Easy-Plan Industries Ltd., 312211 Ontario Ltd. and Fournier Stands Mfg. of Canada Ltd. (Respondents) (*Withdrawn*)

0206-88-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Caddy Chicks Ltd. (Respondent) (*Withdrawn*)

0349-88-U: United Food & Commercial Workers International Union, Local 409 (Complainant) v. Hudson Bay Company, Northern Stores Dept. (Respondent) (*Withdrawn*)

0577-88-U: Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers and its Local 576 (Complainant) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Granted*)

0583-88-U: Kermit Mitchell (Complainant) v. United Brothers of Carpenters & Joiners of North America and Matt Whalen (Respondents) v. Ontario Hydro (Intervener) (*Dismissed*)

0739-88-U: Douglas Lavin (Complainant) v. Cement, Lime, Gypsum & Allied Workers Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL:CIO:CLC, Local D589, and Francis Jones (Respondent) (*Withdrawn*)

1167-88-U: Ruby White (Complainant) v. United Food & Commercial Workers, Local 175 (Respondent) v. Boots Drug Stores (Canada) Ltd. (Intervener) (*Withdrawn*)

1403-88-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union, Steve Buckley and Robert Gebhardt (Complainant) v. Northfield Metal Products Ltd. (Respondent) (*Withdrawn*)

1443-88-U: Ontario Catholic Occasional Teachers' Association (Complainant) v. Essex County Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

1501-88-U, 1649-88-U: Office & Professional Employees International Union (Complainant) v. Burlington Counselling & Human Relations Institute - Cohr Family Services Burlington (Respondent) (*Withdrawn*)

1528-88-U, 1994-88-U: IWA - Canada (Complainant) v. Kakabeka Timber Ltd. (Respondent) (*Withdrawn*)

1651-88-U, 2472-88-U, 2629-88-U: IWA - Canada (Complainant) v. G. Henderson Distributors Manitoba Ltd. (Respondent) (*Withdrawn*)

1717-88-U: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Brink's Canada Ltd. and Jim Hannaford (Respondents) (*Withdrawn*)

1865-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. Falconwin Holdings Ltd. (Respondent) (*Withdrawn*)

1890-88-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Complainant) v. Kermecho Mechanical & Engineering Ltd. (Respondent) (*Withdrawn*)

1942-88-U: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Complainants) v. Ellis-Don Ltd.; Aztec Contracting Inc., and Labourers' International Union of North America, Local 1059 (Respondents) (*Withdrawn*)

1987-88-U: Teamsters Union, Local 419 (Complainant) v. Westburne Industrial Enterprises Ltd., Nedco Division (Respondent) (*Withdrawn*)

1988-88-U: Cecelia Mingo (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

2043-88-U: United Steelworkers of America (Complainant) v. Erdle Perforating Co. Ltd. (Respondent) (*Dismissed*)

2059-88-U: Graphic Communications International Union, Local 500M (Complainant) v. Norman Wade Company Ltd. (Respondent) (*Withdrawn*)

2069-88-U: Virginia Simms (Complainant) v. Retail, Wholesale, Dairy & General Workers' Union, Local 440 (Respondent) (*Withdrawn*)

2119-88-U: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Southern Express Lines of Ontario Ltd. (Respondent) (*Dismissed*)

2188-88-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Complainant) v. Northfield Metal Products Ltd. (Respondent) (*Withdrawn*)

- 2197-88-U:** Keith Lang (Complainant) v. Transport Communications Union (Respondent) (*Withdrawn*)
- 2210-88-U:** Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 340 (Respondent) (*Withdrawn*)
- 2254-88-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Silverwood Structures Inc. (Respondent) (*Withdrawn*)
- 2315-88-U:** Canadian Union of Public Employees (Complainant) v. Durham Recycling (Respondent) (*Withdrawn*)
- 2362-88-U:** Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Hurdman Bros. Ltd. and Keith Grant (Respondents) (*Withdrawn*)
- 2363-88-U:** Ontario Public Service Employees Union and its Local 221 (Complainant) v. Norfolk Association for the Mentally Retarded (Respondent) (*Withdrawn*)
- 2364-88-U:** George D. Knezic (Complainant) v. Ontario Secondary School Teachers' Federation (Respondent) (*Dismissed*)
- 2375-88-U:** Hyman Fishman (Complainant) v. United Garment Workers of America, Local 253 (Respondent) (*Withdrawn*)
- 2376-88-U:** Ontario Public Service Employees Union (Complainant) v. The Religious Hospitallers of St. Joseph of the Hotel Dieu Hospital of Cornwall, Ontario (Respondent) (*Withdrawn*)
- 2456-88-U:** Mireille Parisien (Complainant) v. Hotels, Clubs, Restaurant, Tavern, Employees' Union (Respondent) (*Withdrawn*)
- 2541-88-U:** Ivars S. Oberfelds (Complainant) v. Ford Motor Co. Ltd. (Respondent) (*Dismissed*)
- 2548-88-U:** Local 73 URCL and PWA (Complainant) v. Epton Industries Inc. (Respondent) (*Withdrawn*)
- 2553-88-U:** Ontario Public Service Employees Union and its Local 462 (Complainant) v. Gananoque Ambulance Service (Respondent) (*Withdrawn*)
- 2575-88-U:** H.E.R.E., Local 75 Members Pickering G. S. (Complainant) v. H.E.R.E., Local 75 International Union, Executive Committee (Respondent) (*Withdrawn*)
- 2582-88-U:** Bill MacPherson (Complainant) v. Labourers' International Union of North America, Local 1081, and Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (*Withdrawn*)
- 2612-88-U:** United Brotherhood of Carpenters & Joiners of America, Local 3219 (Complainant) v. Board of Education for the Borough of East York (Respondent) (*Withdrawn*)
- 2622-88-U:** E. S. Fox Ltd. and Tony DeSousa (Complainants) v. International Brotherhood of Electrical Workers, Local 353 and Robert Gill (Respondents) (*Dismissed*)
- 2640-88-U:** London & District Service Workers' Union, Local 220 (Complainant) v. Grace Villa Hospital, London (Respondent) (*Withdrawn*)
- 2641-88-U:** The Association of Allied Health Professional: Ontario (Complainant) v. The Ottawa Civic Hospital (Respondent) (*Withdrawn*)

2674-88-U: International Union of Allied, Novelty & Production Workers, Local 905 (Complainant) v. Dominion Plastics Ltd. (Respondent) (*Withdrawn*)

2687-88-U: United Steelworkers of America (Complainant) v. Neelon Casting Inc. (Respondent) (*Withdrawn*)

2689-88-U: Retail, Wholesale & Department Store Union, Local 440 (Complainant) v. Balderson Cheese Ltd. (Ault Foods) (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1964-88-M: Veronica Hastings (Applicant) v. United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC, Local 88 (Respondent Trade Union) v. Kaufman Footwear, Division of William H. Kaufman Inc. (Respondent Employer) (*Granted*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2243-88-M: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W.), Local 1256 (Applicant) v. Boart Canada Inc. (Respondent) (*Granted*)

FINANCIAL STATEMENT

1310-88-M: William Keagan (Complainant) v. Seafarers International Union of Canada (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1897-87-JD: Kennedy Lodge Nursing Home Ltd. (Complainant) v. Ontario Nurses' Association and Service Employees International Union, Local 204 (Respondents) (*Withdrawn*)

1936-88-JD: Fraser Inc., Thorold Division (Complainant) v. Canadian Paperworkers Union, C.L.C., Local 290, and Canadian Paperworkers Union, Local No. 1521 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEES STATUS

2712-86-M: Ontario Public Service Employees Union (Applicant) v. Royal City Ambulance Service Ltd., (formerly known as Royal City Ambulance Service) (Respondent) (*Withdrawn*)

3563-87-M: Sunnybrook Medical Centre (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

0484-88-M: Nel Gor Castle Nursing Home (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

0649-88-M: Ontario Public Service Employees Union (Applicant) v. Superior Ambulance Services (Respondent) (*Granted*)

0968-88-M: Ontario Nurses' Association (Applicant) v. St. Peter's Hospital (Respondent) (*Granted*)

1359-88-M: St. Joseph's Health Centre of London (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

2169-88-M: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Withdrawn*)

2304-88-M: C.U.P.E. and its Local 133 (Applicant) v. The Corporation of the City of Niagara Falls (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2160-88-OH: Cecil Devine (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2266-88-OH: Al Hayward and 31 Other Employees, Members of Canadian Paperworkers Union, Local 41 (Complainant) v. Great West Timber Company (Respondent) (*Withdrawn*)

2430-88-OH: Anna Hoffner (Complainant) v. Dortec Industries (Respondents) (*Withdrawn*)

2534-88-OH: Ernest A. Taylor (Complainant) v. Robert Laalo (Falconbridge Ltd.) (Respondent) (*Withdrawn*)

2751-88-OH: Samuel Sims and Sancharie Sims (Complainants) v. Ogden Allied Canada (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

0020-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ellis-Don Ltd.; and Aztec Contracting Inc. (Respondents) (*Withdrawn*)

1272-87-G: Ontario Sheet Metal Workers Conference (Applicant) v. Sayers & Associates Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 540 (Intervener) (*Withdrawn*)

2033-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. The Board of Governors of Exhibition Place (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

2593-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Leslie's Roofing (Respondent) (*Withdrawn*)

2641-87-G: Ontario Sheet Metal Workers Conference (Applicant) v. B.V.A. Manufacturing Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 540 (Intervener) (*Withdrawn*)

3572-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. U D M Excavating & Contracting Ltd. (Respondent) (*Withdrawn*)

1716-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Underground Services Ltd. (Respondent) (*Withdrawn*)

1759-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Victor Carpentry (Respondent) (*Granted*)

1773-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Jackson Lewis Co. Ltd. (Respondent) (*Granted*)

1856-88-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Canmec Mechanical Contractors Ltd. (Respondent) (*Granted*)

1919-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Jan Peters Ltd. (Respondent) (*Withdrawn*)

2026-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Con-Elco Ltd. (Respondent) (*Withdrawn*)

2208-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ferrato Custom Homes (Respondent) (*Withdrawn*)

2239-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. W. G. Gallagher Construction Ltd. (Respondent) (*Granted*)

2240-88-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. W. G. Gallagher Construction Ltd. (Respondent) (*Granted*)

2241-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. W. G. Gallagher Construction Ltd. (Respondent) (*Granted*)

2256-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Macwall Forming Inc. (Respondent) (*Withdrawn*)

2432-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Direct Interior Contractors (Respondent) (*Withdrawn*)

2433-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Macon Drywall Systems (Respondent) (*Withdrawn*)

2475-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Delrock Drywall Systems (Respondent) (*Withdrawn*)

2540-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Granted*)

2549-88-G: Teamsters, Local 230 (Applicant) v. San Lee Construction Ltd. (Respondent) (*Withdrawn*)

2550-88-G: Teamsters Local 230 (Applicant) v. Sebco Construction Ltd. (Respondent) (*Withdrawn*)

2552-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Secord Inc. (Respondent) (*Granted*)

2598-88-G: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Mack Coating & Sandblasting (Respondent) (*Withdrawn*)

2605-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. National Caterers Ltd. (Respondent) (*Withdrawn*)

2675-88-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

2676-88-G: International Union of Bricklayers & Allied Craftsmen, Local 8 (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

2682-88-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

2715-88-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Greenspoon Brothers Ltd. (Respondent) (*Withdrawn*)

2722-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Devon Structural Ltd. (Respondent) (*Withdrawn*)

2724-88-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. City Acoustics Ltd. (Respondent) (*Withdrawn*)

2734-88-G: International Brotherhood of Painters & Allied Trades, Local 1824 Painters (Applicants) v. Ainsworth Glass & Mirror (Respondent) (*Granted*)

2737-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. & R. Foundations Ltd. (Respondent) (*Granted*)

2745-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sterling Homes Renovations A Division of Jebco Holdings Ltd. (Respondent) (*Withdrawn*)

2746-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. V. S. Woodworking Inc. (Respondent) (*Withdrawn*)

2749-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Baker Installations Ltd. (Respondent) (*Withdrawn*)

2750-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

2752-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ron Engineering & Construction (Eastern) Ltd. (Respondent) (*Withdrawn*)

2769-88-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. Kite Painting Company Ltd. (Respondent) (*Withdrawn*)

2784-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Doran Contractors Ltd. (Respondent) (*Withdrawn*)

2785-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Stone & Webster Canada Ltd. (Respondent) (*Withdrawn*)

2795-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Kirk Boutette c.o.b. as Douglas Welding International (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1295-85-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Hamilton Yellow Cab Company Ltd., Fleet Taxi, Yellow Taxi, Transportation Unlimited Inc., D. J. Van Boort, R. Cruden, R. Maurice, J. Lynch, B. Greenland, M. Ferguson, R. Greer, E. Grasley, V. Sudhir, A. Dicasa, P. Dicasa, R. Deacons, R. Botton, F. Mattioli, W. Bray, J. R. McNally, R. Kaur, G. Seliga, W. T. Vanderheyden and Peter Quesnelle (Respondents) (*Dismissed*)

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